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91-684

SUPREME COURT, U.S.
FILED
OCT 22 1991
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No.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

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STOUDER MEMORIAL HOSPITAL, Petitioner,

v.

ANASTASIA S. CHRISTOPHER

PETITION FOR A WRIT OF CERTIORI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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## QUESTION FOR REVIEW

Whether a party who has no contractual or employment relationship with an employer can be an "employee or applicant for employment" for jurisidictional purposes under 42 U.S.C. Section 2000e-3.

## LIST OF PARTIES

All of the parties in the United States Court of Appeals for the Sixth Circuits are listed in the caption.

## CORPORATE PARTY AFFILIATION

Petitioner has no subsidiaries or affiliates, except that petitioner is part of a holding company known as Upper Valley Medical Center, a non-profit corporation which has two additional subsidiaries known as Dettmer Hospital and Piqua Memorial Medical Memorial Center.

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IN THE SUPREME COURT OF THE UNITED STATES

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## OPINIONS BELOW

The June 24, 1991, opinion of the Court of Appeals of the Sixth Circuit, is reported at 936 F.2d 870 and appears in the Appendix. The July 24, 1991, judgment denying rehearing also appears in the Appendix. The pertinent opinions of the United States District Court, Southern District of Ohio, are unreported, but appear in the Appendix.

## JURSIDICTION

The judgment of the Court of Appeals was entered on June 24, 1991. A timely petition for rehearing was denied on July 24, 1991.

The jursidiction of the Court is invoked under 28 U.S.C. Section 1254(1).

## §2000e-2. Unlawful employment practices

### Employer Practices

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

## §2000e-3. Other unlawful employment practices

### Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

## STATEMENT OF THE CASE

Respondent Anastasia Christopher is a nurse who received a Bachelor and a Master of Science Degrees from the Ohio State University and had previously filed a sex discrimination suit against a former employer which was resolved after litigation had been commenced.

During 1985, respondent was hired as a "pool nurse" at the petitioner hospital, began working "on call", generally part-time, and as needed in the labor, delivery and nursing areas of the hospital. She was eventually terminated from that position, and although she brought suit in the instant case for wrongful termination and Title VII liability under the termination of that job, the court dismissed those claims.

In the fall of 1986, respondent applied to the hospital for limited privileges to act as a private scrub nurse for her husband's obstetrical practice.

Although repsondent had never previously worked as a scrub nurse, she had assisted in surgery many years before at a different hospital. A private scrub nurses duties are to know specifically the procedures of the physician that she works for, to know the types of instruments he needs, to know when to anticipate his needs, to prepare the operating field, to prepare the patients, to maintain sterile technique and to care for the patient in immediate post-op areas until recovery; it is an extremely technical job. Private scrub nurses are employeed and paid by the physician for whom they work. They are scheduled by the physician, work under the physcian's control and supervision, follow the physician's orders, and are disciplined and terminated by the physician.

Because of some technical difficulties in processing resondent's application for privileges, temporary priviliges which had been granted to her, lapsed, and eventually, the respondent was denied her limited privileges to act as a private scrub nurse. While

respondent presented evidence that she was qualified, petitioner offered evidence that she was qualified, and this specific matter has been remanded to the trial court for further disposition.

As a result of the denial of privileges, respondent brought this action for relief under 42 U.S.C. §2000e-3 for employment discrimination and a state breach of contract claim against petitioner hospital, requested compensatory damages and reinstatement, and that she be granted her privileges.

Jurisdiction was founded upon 28 U.S.C. §1331 and §1343 and Title VII of the Civil Rights Act, 42 U.S.C. §2000e-3.

Prior to trial, petitioner filed a Motion in Limine objecting to repsondent's employment status, which was overruled on the first day of the trial.

During the trial, the court granted petitioner's motion to dismiss regarding the termination of certain of respondent's claims but retained jurisdiction in the case for the retaliation claim regarding respondent's denial of hospital privileges to be a private scrub nurse.

The court issued its decision on July 25, 1988, and granted judgment in favor of respondent on the Title VII denial of limited privileges claim, finding retaliatory discrimination.

Respondent moved to amend the judgment, or alternatively for a new trial, which was denied.

In its decision, the court noted that a remedy regarding privileges was at issue, and the parties entered into a negotiation which proved to be unsuccessful regarding that issue.

In its findings, the trial court held that respondent was not an independent contractor with respect to petitioner hospital, and earlier had found that no employment relationship would exist.

Appeal to the Sixth Circuit resulted in a remand of the case to the trial court on the issue of qualifications, but affirmed the trial court's determination that Title VII coverage applied to respondent's position. The Sixth Circuit did not change the factual determinations of the trial court that respondent did not have a contractual, nor an employment relationship, but adopted language from other cases regarding justification of jurisdiction when such relationship does not exist.

It is that determination upon which this petition has been filed.

## ARGUMENT

The petitioner Stouder Memorial Hospital respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered June 24, 1991, rehearing denied July 24, 1991.

This is a case of first impression. While the broad category of relief sought by respondent was under the umbrella of Title VII, the action was limited to a discrimination claim based on retaliation and specifically alleged a violation of §704(a) of the Civil Rights Act [42 U.S.C. §2000e-3(a)], which states in part:

> "It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, . . . because he has opposed any practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." (Emphasis added)

There was no allegation of any other Title VII violation; all matters tried and argued were limited to the application of that specific section of the Act.

As early as the case of *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), the Supreme Court noted a difference the retaliation

section and other sections of the Civil Rights Act.

> "The former section [§2000e-2(a)(1)] generally prohibits racial discrimination in any employment decision while the latter [§2000e-3(a)] forbids discrimination against applicants or employees for attempting to protest or correct allegedly discriminatory conditions of employment." *Id.* at 796.

Unfortunately, in the multitude of cases (and there are many) cited under §704, most are not single issue cases but mixed motive cases that join allegations of retaliation and other forms of discrimination protected under §703 (e.g. race, religion, sex, etc.).

Therefore, in interpreting the protection afforded by the statute, most courts have had a choice of which language (§703 or §704) to use in making decisions, and the language is different.

Section 703 provides, in pertinent part:

> "(a) it shall be an unlawful employment practice for an employer - (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, privileges of employment, because of such individual race, color, religion, sex, or national origin; . . ." (Emphasis added).

This language is completely different than §704.

It probably goes without saying that if Congress had intended to "lump" retaliation discrimination with other forms of discrimination in §703, it could have done so; but it specifically did not. And that is what the Supreme Court quote beginning this brief is intended to convey - there is a difference between retaliation and other forms of discrimination.

Congress recognized that the discrimination that takes place in retaliation cases is different; so is the language of the statute.

The fact is that there is not only a language distinction but a practical distinction, and valid reasons for the differentiation. The criteria of a violation of §703 reasons do not require any pre-condition. Individuals already "possess" their race, sex, national origin, etc. However, an individual does not "carry" retaliation around; it must be affirmatively earned and disclosed - there is a pre-condition.

The trial court made a factual finding, which was not reversed by the appellate court, that respondent had no intended "employment relationship" with petitioner. The appellate court found no "contractual relationship". Based upon these findings, a reasonable reading of §704 should divest the Court of its jurisdiction. The statute is very clear that the respondent (or any claimant) must be an employee or applicant for employment.

It was also determined that respondent was not an employee, and no relationship such as an independent contractor existed either. Neither did the term applicant apply - because "employment" is still the criteria for an applicant, something which respondent failed to meet.

However, both Courts then proceeded to go beyond the language of the statute, and expanded the coverage of §704 into unchartered waters beyond employment.

No case cited by either Court used the exclusive language of §704 to justify its position.

In each instance, the Court used cases which interpreted other discrimination statutes and not the language of the retaliation statute.

The statutory language alone should be sufficient to deny jurisdiction based upon the factual finding of no employment

relationship and the finding that the respondent was neither an employee nor an independent contractor. "The basis of all relief under Title VII is that the claim must necessarily involve an employment relationship." *Diggs v. Harris Hospital - Methodist, Inc.*, 847 F.2d 270, 272 (5th Cir. 1988), *cert. denied,* 109 S.Ct. 394 (1989).

However, the Court justified its position, expanding the coverage of a third party, without recognizing the statutory limitations that those cases discuss.

Both Courts relied a great deal on *Sibley Memorial Hospital v. Wilson,* 488 F.2d 1338 (D.C. Cir. 1973).

The facts of that case were that a male duty nurse alleged discrimination based on sex for a hospital's refusal to refer patients to him as a private duty nurse. The plaintiff in that case had no relationship with the hospital, but received referrals from a registry that was maintained by the hospital. Despite the fact that he was not an employee of the hospital, the Court held that since the action of the hospital affected him as an "individual", that §703 applied. However, in doing so, the Court specifically quoted §703 which specifically expands coverage to "individuals;; rather than employees or applicants for employment as the limiting language of §704 provides. However, the same circuit, in *Spirides v. Reinhardt,* 613 F.2d 826 (D.C. Cir. 1979), seems to reject *Sibley*. In *Spirides* the court held that for a determination of Title VII coverage, a factual review of the "economic realities" of the relationship should be the criteria. In addition, the "right to control the 'means and manners' of the worker's performance is the most important factor." *Id.* at 831. More importantly, that court found that individuals who were independent contractors or those not directly employed by such an employer are unprotected by the statute. *Id.* at 829. Respondent was held not to be an independent contractor by the appellate court in this case.

The appellate court also relied upon cases of *Gomez* and *Pao*. Both of those cases are irrelevant to the factual case because again they are not §704 cases, and they are further distinguished by their facts.

In *Gomez v. Alexian Bros. Hospital*, 698 F.2d 1019 (9th Cir. 1983), the District of Columbia Circuit allowed a physician to state a Title VII action for refusal of a hospital to grant him by staff privileges. However, once again, it was brought under §703 and not under the retaliation statute. More importantly, the court recognized that in order for Title VII protection to apply "there must be some connection with an employment relationship." *Supra* at 1021. Further, that case is distinguishable because it involved a corporation that was the employer of a number of physicians who rendered medical services as part of a group medical practice.

In *Pao v. Holy Redeemer Hospital*, 547 F. Supp. 484 (E.D. Pa. 1982), while a cause of action was recognized in the decision, it was brought under §703. It does not cite (nor does it involve) the appropriate relevant statute: §704.

If the respondent is not an employee, and if she is not an independent contractor, then this Court should distinguish and determine the applicability of §704 to her relationship to petitioner. As *Spirides*, said, independent contractors are not covered. See also *Falls v. The Sporting News Pub., Inc.*, 834 F.2d 611 (6th Cir. 1987).

Then, how can Title VII cover a party even further removed from that direct relationship?

The issue of Title VII coverage to third parties as opposed to employees has generated a great deal of interest in the circuits; the cases seem to cross all issues, using analogies of various other social legislation and provide authority for a broad spectrum of conclusions.

However, those cases fail to review their facts under the limited view as provided by §704 of the Act.

The more relevant argument should come from cases that interpret §704 alone, and not a combined case with mixed language.

In *Hale v. Marsh,* 808 F.2d 616 (7th Cir. 1986), the court phrased its issue: "whether an employer who retaliates against another *employer's employee* for that employee's having opposed charged, etc. unlawful discrimination against himself or somebody else violates the retaliation . . . provision of Title VII of the Civil Rights Act of 1984, 42 U.S. §2000e-3(a)." *Id.* at 618.

*Hale* was an employee of the federal government who helped another individual file a racial discrimination claim against the Corps of Engineers. An employee of the Corps wrote a letter of complaint to the head of Hale's employer complaining of Hale's action, and as a result of the letter, Hale filed a retaliation claim against the Corps (Army).

The Court noted that the basic language of the statute was contrary to the plaintiff's assertion. The statute [§2000e-3(a)] forbids 'an employer to discriminate against any of *his* employees or applicants for employment . . . . ' *Supra* at 619 (Emphasis supplied).

In denying the claim, the court acknowledged distinctions between the remedies available, however it concluded that liability (or jurisdiction) should not be extended under §704 where the retaliator is not the victim's employer. *Supra* at 620.

Following this principle in the instant case, since there was no employment or contractural relationship, respondent could not be the employee of the petitioner for purposes of §704 relief. In order to allow jurisdiction in this case, the court must make a finding of an employment relationship, or a finding that the respondent is an employee or applicant with petitioner - that is the language of the statute, and those findings have been rejected by both lower courts.

This requirement of a relationship was also discussed in *Hishon v. King & Spalding,* 467 U.S. 69, 81 L.Ed.2d 59, 104 S. Ct. 2229 (1984), where a law firm associate brought a Title VII action under §703 to enforce rights against the partnership. While the statute is different, even under that section (§2000e-2), the Supreme Court stated that before Title VII attaches to the specific aspects of a case, a "contractual relationship of employment must be established." *Supra* at 74 that finding has been rejected herein.

By allowing jurisdiction, the appellate court has expanded the language of §704 to the far reaching position that the term "employee" can mean any individual who is effected by an employer's action. This is the definition that the courts have characterized as "magnificent circularity." *Broussard v. L.H. Bossier Inc.,* 789 F.2d 1158, 1160 (5th Cir. 1986). This definition should be rejected because Title VII is not an anti-discrimination law, it is an employment discrimination law.

Further, this recognition completely ingores the specific language of the statute and the legislative intent of Congress. It also ignores logic, because if that was the intent, then why didn't Congress ban all discrimination under one section.

"While it would be a desirable goal to eliminate racial discrimination in all business enterprises, it does not appear that Congress intended such a broad objective for Title VII, The emphasis on the word 'employment' in the legislative history supports such a conclusion." *Cobb v. Sun Papers, Inc.,* 673 F.2d 337, 340 (11th Cir. 1982).

Section 704 must be more direct in its relationship, because it is more direct. It is clear that §704 is limited to jurisdiction to employees or applicants for employment.

If the court allows this vague relationship to substantiate jurisdiction, the system will fail for §704 cases. How will the alleged lawful party know that it has discriminated? How will the alleged wrongful party know that the claimant is a protected party?

In this case, for example, if respondent was not protected (i.e. had no previous EEOC claim upon which to base her §704 suit), and if petitioner denied her application for privileges, there would be no claim. We must assume that petitioner can deny privileges for any reason (or no reason) and be justified in doing so without violating a protected issue such as sex or race.

But if the claimant is protected by a previous claim and has no other discrimination claim, and if the petitioner rejects for no reason, how is petitioner to defend the unknown discrimination.

If the claimant meets her prima facie proof, the burden shifts to the employer, who has no evidence of rejection. The employer has no knowledge of the protected individual (or the previous claim), and therefore, had no reason to make a specific denial. The employer would then be forced to manufacture a reason for denial, and all because the employer did not know, and could not know of the previous claim.

In requiring a direct contractural relationship, at least the employer has the opportunity and ability to gain some knowledge about the applicant, and the employer can more legitimately make its employment decision.

In retrospect to jurisdictional application, in interpreting the statutory language, each of these cases cited below can be found to be justified because a "claimant" can be an "individual" under §703.

However, the term "individual" is not a definitional term under §704. Therefore, in a §704 case, the claimant must meet the language of the statute, and in this case, the claimant must be an "employee or applicant for employment." The word 'employee,' however broadly defined is still 'employee . . . . ' *Wheeler v. Hurdman,* 825 F.2d 257, 276 (10th Cir. 1987).

In this case, not only did the court fail to make such a finding, the courts found that there was no relationship between respondent

and petitioner (employment or contractural), but the courts went further afield and used cases interpreting §703 to justify jurisdiction. This was error.

## CONCLUSION

The Equal Employment Opportunity Commission and the federal courts have seen a great increase in the number of cases filed in recent years, and thousands of cases are being filed to gain equal employment rights for individuals. Each time one of these cases is filed, and even each time a claim is brought before the EEOC, a new individual is brought under the broad definition of §704 of the Civil Rights Act as an additional statute upon which to bring a later employment discrimination case.

Accordingly, even as discrimination claims grow under §703 (for race, sex, religion, etc.), an equal number of cases is created for possible claims under §704 - later retaliation. The numbers that are being produced are staggering for the court system and the administration of that system.

In order for the system to handle these cases, the courts must have a reasonable explanation of what relationship §704 will require. Does §704 cover independent contractors? Does §704 cover third parties who have no employment or contractural relationship with the claimant? Or does §704 limit itself to the statutory language that the claimant must be an "employee or applicant for employment?"

These are issues that are not only unanswered, they require an answer for purposes of judicial economy and fair and equitable interpretation by the circuits.

A projected syllabus of the case to be decided seems somewhat simplistic, since it follows the language of the statute, but the failure of the Courts below to limit their interpretation to the statutory language of §704 seems to reject that projected syllabus:

"In order for §704 of the Civil Rights Act to be applicable, a claimant under that section must be an employee or an applicant for employment."

Respectfully Submitted,

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## APPENDIX

A. Judgment Denying Rehearing
July 24, 1991

B. Decision of the Court of Appeals
June 24, 1991

C. Order Denying Motion for New Trial
March 30, 1990

D. Journal Entry Modifying Decision on Remedy
February 5, 1990

Case Nos. 90-3400/3429
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

ANASTASIA S. CHRISTOPHER

Plaintiff - Appellee Cross - Appellant

v.

STOUDER MEMORIAL HOSPITAL

Defendant - Appellant Cross - Appellee

BEFORE: JONES and SUHRHEINRICH, Circuit Judges; and FEIKENS, District Judge.

Upon consideration of the petition for rehearing filed by the appellant cross - appellee, the court concludes that the issues raised were fully considered upon the original oral argument and decision of this case,

It is ORDERED that the petition for rehearing be, and it hereby is, DENIED.

ENTERED BY ORDER OF THE COURT

ss Leonard Green, Clerk

Filed July 24, 1991.

Nos. 90-3400/3429

**UNITED STATES COURT OF APPEALS**

FOR THE SIXTH CIRCUIT

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Anastasia S. Christopher,
*Plaintiff-Appellee,*
*Cross-Appellant,*

*v.*

Stouder Memorial Hospital,
*Defendant-Appellant,*
*Cross-Appellee.*

On Appeal from the United States District Court for the Southern District of Ohio.

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Decided and Filed June 24, 1991

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Before: JONES and SUHRHEINRICH, Circuit Judges; and FEIKENS, Senior District Judge.*

NATHANIEL R. JONES, Circuit Judege. Defendant-appellant Stouder Memorial Hospital ("Stouder"), appeals the trial court's judgment for the plaintiff-appellee Anastasia Christopher in this Title VII civil rights action. Christopher cross-appeals the court's refusal to award her back pay on her retaliation claim. [1]

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*The Honorable John Feikens, Senior District Judge for the Eastern District of Michigan, sitting by designation.

I.

Christopher, a female nurse, was awarded a B.S. degree in nursing from Ohio State University in 1974 and a M.S. degree in nursing from the same institution in 1977, with particular emphasis in maternal and child health. She is married to Charles Christopher, M.D., a practicing obstetrition and gynecologist.

From 1978 until 1983, Ms. Christopher was a faculty member at the Wright State University School of Nursing. In June 1983, she filed a sex discrimination claim against Wright State. Her claim eventually resulted in a Title VII lawsuit which was resolved prior to trial. No details about Christopher's charge or settlement are part of the record in this case.

During the lawsuit, Christopher's husband, Charles, was also experiencing difficulties with his hospital, where he was head of obstetrics, and the couple decided to move to Troy, Ohio. Charles formed a partnership with Dr. Gerald Dysert, who was performing deliveries and gynecological surgery at Stouder when Dr. Christopher joined him in practice.

During the spring of 1985, Ms. Christopher was hospitalized for surgery at Stouder. During her recovery she discussed the possibility of nursing employment at Stouder with Sally Swisshelm, Director of Nursing. Christopher told Swisshelm that she had had discussions with her husband and his partner about working as a "scrub nurse" for them during surgery. Stouder hired Christopher on June 10, 1985. Her formal title was "pool nurse" although it appears she had been hired to work in some sort of capacity as a trainer for other nurses in the Ob/Gyn department.

After a brief period, Christopher's uncertain status resulted in tension with the other nurses. This was in part because she was attempting to train nurses many of whom [2] had been at Stouder for many years. One of Christopher's duties during her work at Stouder was to prepare the obstetrical nurses to assist as scrub nurses during cesarean section procedures. Apparently, everyone

agreed that Christopher herself needed training in this area, since she had very little prior experience as a scrub nurse. As a result, Christopher began to train in the Stouder operating room in July and August of 1985. The apparent plan was that Christopher would pass on her training to other nurses in obstetrics, rather than sending the nurses to another hospital for training.

In July, 1985, Christopher applied to Stouder to obtain limited privileges to act as a private duty scrub nurse at the hospital. The procedure for deciding on privileges was that the application would remain with the medical staff secretary until complete. The application would then be passed on to the Executive Committee of the Medical Staff, then to the full medical staff and finally to the Board of Trustees. During the period in which the application was being considered, the hospital's president was empowered to grant temporary privileges for a period of ninety days. The Executive Committee approved this request on August 6, 1985, and John Grubb, President of Stouder, granted Christopher temporary privileges on October 23, 1985.

After her temporary privileges were granted, Christopher began to act as a private scrub nurse for her husband and his partner. A scrub nurse's duties are primarily to prepare instruments for surgery, to hand them to the surgeon during the operation and to clean up after the operation. As of 1985, there were only two nurses acting in the capacity of private scrub nurse. According to Ms. Nagle, operating room supervisor, there had been only one prior experience with a private duty scrub nurse in her thirty years experience with surgery at Stouder. Normally, the procedure at Stouder was for regular nurses employed by the hospital to act as scrub nurses.

Private duty scrub nurses are normally paid by the [3] doctors with whom they work. They are not employees of the hospitals itself, and the hospital does not cover their insurance or benefits. However, during her training period, and during the tenure of her

temporary privileges status, Christopher was paid and insured by the hospital.[1]

In January, 1986, Ms. Swisshelm concluded that the obstetrical nurses were not obtaining their new skills fast enough and hired a special obstetrics supervisor to perform the training tasks Christopher was hired to perform. Grubb approved this new plan, and on January 10, 1986, Christopher was informed that her services as a clinical nurse specialist would no longer be needed. It is not clear from the record whether Christopher was actually fired at this point, or whether she remained on the schedule as a "pool nurse."

Christopher objected to Stouder's decision and hired counsel to represent her against the hospital.[2] In the meantime, her temporary privileges had expired. Apparently, one of her references had not responded to the hospital's request for a reference letter because he had moved his practice. He was later contacted and Christopher's file was completed on January 26, 1986.

Before Christopher's application for limited privileges was reviewed by the Executive Committee, Ms. Swisshelm was asked to review Christopher's competence. In a memo dated January 31, 1986, she questioned Christopher's training ability and characterized her as "disruptive" and "untrustworthy." She noted that Christopher had written on doctor's progress notes in [4] contravention of hospital policy even after being advised it was inappropriate. She also asserted that Christopher had caused "chaos" in both obstetrics and surgery.

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[1]Christopher's pay arrangement seems to have been a temporary one indulged in by the hospital because Christopher's husband and his partner were trying to save for some new laser equipment. The details of this pay arrangement are not crucial for the resolution of this appeal.

[2]Christopher's complaint included a Title VII claim with regard to her "dismissal" from her trainer position, as well as a state claim for breach of contract. However, those claims were both dismissed and that decision has not been appealed.

Dr. Mark Hess, a member of the Executive Committee, also prepared a memorandum on Christopher. At the request of the Chief of Medical Staff, Dr. Ellenbogen, he contacted L.R. Jordan, chief executive of Miami Valley Hospital, about Christopher's work when she was stationed there by Wright State. According to Dr. Hess's memo, Jordan said that Christopher's tenure at Miami Valley had been "marked by severe turmoil," that she had "assumed authority far beyond what was proper," including writing prescriptions for her husband's countersignature, and that she had an "endless series of conflicts with many people." He also advised that Miami Valley insisted on her transfer and she thereupon sued for sex discrimination.

On February 4, 1986, the Executive Committee voted unanimously to deny Christopher's application for limited privileges. On March 20, 1986, Christopher "withdrew" her prior application for limited privileges and filed a second more limited application. It appears she filed the second application because she was informed that her first application had been too broad. It seems Christopher had asked for permission to do a number of procedures normally handled exclusively by doctors at Stouder. Christopher's second application was supported by recommendation letters from her husband, Dr. Dysert and Dr. Kevin Horvath, a pediatrician practicing at Stouder.

After consulting with Dr. Ellenbogen, Chief of Staff, Ms. Nagle prepared a set of standards for private scrub nurses for the hospital. These standards included a requirement that private scrub nurses have at least one year of experience as a scrub nurse. Evidently, these standards were prepared in February, 1986, but were not approved by the hospital until 1987. Nonetheless, the standards were used to prepare a questionnaire for the other surgery nurses to review Christopher's [5] qualifications. Virtually, all of the nurses surveyed found that Christopher was deficient with respect to the standards. These results were made available to the Executive Committee which on May 6, 1986, again voted to deny Christopher limited privileges.

This action followed and the parties agreed to conduct the trial before a magistrate. A trial was held from July 11-13, 1988.

Dr. Hess was the only member of the Executive Committee to testify at trial. During his testimony he denied that he had considered Christopher's prior Title VII lawsuit for sex discrimination at Miami Valley in deciding how to vote on Christopher's privileges application. However, the magistrate credited testimony by Christopher as to two conversations she had had with Grubb and with Dr. Hess. Christopher testified that she had talked to Grubb by telephone in January of 1986 and attempted to negotiate the issue of her privileges. He reportedly responded, "If you hadn't had some legal action prior to this, this might not have occurred." J. App. at 23. Christopher also recalled a conversation with Dr. Hess on March 9, 1986, in which he reportedly also told her that she was having difficulties because of her prior legal action at Miami Hospital.

While the court dismissed all of Christopher's other claims at the close of plaintiff's case, he found that she had established her claim of retaliation. In reaching this result the court found that Christopher's prior sex discrimination action had been mentioned enough times in the process surrounding her applications for limited privileges to warrant a conclusion that Stouder would not have made the same decision absent the factor of the prior suit. The court also noted that much of the evidence used to deny Christopher's second application "seems to have been manufactured to guarantee the result." J. App. at 31. Specifically, the court found that the scrub nurse standards drafted by Ms. Nagle required one year experience as a scrub nurse, which made Christopher [6] ineligible. The court found these standards "plainly discriminatory against the private scrub nurse concept since Mrs. Nagle admitted on the stand that nurses were sometimes hired directly from nursing school into the operating room at Stouder." *Id.* Finally, the court concluded that Ms. Nagle could have easily learned that Christopher would be excluded by the one-year requirement by looking at her file.

Despite the court's finding in favor of Christopher on her retaliation claim, it found that Christopher was not entitled to back pay. While there was some initial confusion about whether the court had the authority to award back pay damages against Stouder when the hospital was not Christopher's employer, the court ultimately determined that back pay was not appropriate because Christopher had failed to prove damages.

Recognizing that the hospital had a strong interest in ensuring that Christopher was qualified to be a private scrub nurse, and at the same time, acknowledging that the process used to evaluate Christopher had been flawed, the court ordered the parties to negotiate a neutral means for evaluating Christopher's abilities as a scrub nurse. When the parties failed to reach a reasonable solution, the court ordered that Christopher work for six weeks for two neutral doctors, who would independently evaluate her performance. When this too became unworkable, due in part to Stouder's refusal to cooperate, the court ordered that Christopher be granted limited privileges to work as a private scrub nurse at Stouder for any doctor who would employ her. The court was careful to make clear that it was not forcing Christopher into an employment relationship with the hospital. Rather, it was simply undoing the discriminatory application of heightened standards which had been applied to Christopher.

II.

Stouder first contends that the court lacked jurisdiction to hear this case because Christopher was neither an [7] "employee" nor an "applicant for employment" at Stouder. The provision of the Civil Rights Act which enables plaintiffs to sue for retaliation provides, in pertinent part:

> (a) It shall be an unlawful employment practice for an employer *to discriminate against any of his employees or applicants for employment* . . . because he has opposed any practice made an unlawful employment practice by this subchapter or because he had made a charge, testified,

assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. §2000e-3 (emphasis added). While it is true that Christopher was not a direct employee of Stouder, we find that Stouder's control over Christopher's ability to practice as a private scrub nurse sufficiently impacted her employment opportunities to bring her claims within the intended scope of §2000e-3.

As the trial court noted, our caselaw requires that "[t]he term 'employee' in Title VII 'must be read in light of the mischief to be corrected and the end to be attained.' " J. App. at 70 (Order denying motion for new trial, quoting *Armbruster v. Quinn*, 711 F.2d 1332, 1340 (6th Cir. 1983)). Further, we have repeatedly said the "Title VII of the Civil Rights Act should not be construed narrowly." *Tipler v. E.I. du Pont de Nemours and Co.* 443 F.2d 125, 131 (6th Cir. 1971). In this spirit, several courts have held that Title VII does not require a formal employment relationship between the plaintiff and the defendant. Rather, a plaintiff is protected if the defendant is one "who significantly affects access of any individual to employment opportunities." *Doe v. St. Joseph's Hosp.,* 788 F.2d 411, 422-25 (7th Cir. 1986) (doctor stated a claim under Title VII when hospital denied staff privileges even though doctor was not an employee of the hospital); *Gomez v. Alexian Bros. Hosp.,* 698 F.2d 1019, 1021 (9th Cir. 1983) (finding a cause of action under Title [8] VII when " 'a defendant subject to Title VII interferes with an individual's employment opportunities with another employer.' " (quoting *Lutcher v. Musicians Union Local 47,* 633 F.2d 880, 883 n.3 (9th Cir. 1980)).

The trial court in this case relied on the D.C. Circuit's opinion in *Sibley Mem. Hosp. v. Wilson,* 488 F.2d 1338 (D.C. Cir. 1973) to find that Christopher had jurisdiction to sue. *Sibley Mem. Hosp.* concerned a sex discrimination claim under Title VII by a private duty nurse against a hospital. The basis of the plaintiff's claim was that the hospital's Nursing Office would not refer the nurse, who was a male, to female patients who requested a private duty nurse.

This action by the hospital was in contravention of its own policy of referring patients to the next available private nurse in its register. The defendant hospital moved to dismiss on the ground that the plaintiff was not in an employer-employee relationship with the hospital and therefore the court did not have jurisdiction to hear the claim. However, the district court found that the plaintiff stated a claim under Title VII and the D.C. Circuit affirmed.

In its *Sibley Mem. Hosp.* opinion, the court began by pointing out that "The Supreme Court has said that the Congressional objective in Title VII is 'plain from the language of the statute,' and that it is 'to achieve *equality of employment opportunities*[.]' " *Id.* at 1340-41 (emphasis original) (quoting *Griggs v. Duke Power Co.,* 401 U.S. 424, 429 (1969)). The court then reasoned that in certain circumstances control over access to employment may reside in organizations such as unions or employment agencies "which have not a remote but a highly visible nexus with the creation and continuance of direct employment relationships between third parties." *Id.* at 1342; *see* 42 U.S.C. §2000e-2 (b) and (c). From these premises, the court reasoned: [9]

> To permit a covered employer to exploit circumstances peculiarly affording it the capability of discriminatorily interfering with an individual's employment opportunities with another employer, while it could not do so with respect to employment in its own service, would be to condone continued use of the very criteria for employment that Congress has prohibited.

*Id.* at 1341. The court went on to determine that the hospital, while not the plaintiff's employer, was in the same position to interfere with the plaintiff's employment opportunities as unions or employment agencies, and therefore, "neither the spirit nor, more essentially, the language of the Act" prohibited the plaintiff from proceeding against the defendant hospital. *Id.* at 1342.

The facts of the instant case are directly analogous to the situation in *Sibley Mem. Hosp.* Like the nurse in *Sibley*, Christopher

cannot pursue her employment opportunity of working as a private scrub nurse if Stouder does not grant her limited privileges. If Stouder denies those privileges to Christopher on impermissible grounds, it is, in effect, denying her employment on impermissible grounds, despite the fact that it does not pay her salary.

Stouder argues that *Sibley, Gomez,* and *Doe* are distinguishable because all of those cases were actions brought under §2000e-2, which allows a broader range of persons to sue than §2000e-3 upon which Christopher relies. §2000e-2 provides in relevant part:

> (a) It shall be an unlawful employment practice for an employer--
>
> (1) to fail or refuse to hire . . . *any individual,* or otherwise discriminate against *any individual* with respect to his compensation, terms, condition, or privileges of employment[.]

42 U.S.C. §2000e-2 (emphasis added). By comparison, [10] §2000e-3 refers to the protected class as "employees or applicants for employment." *See* 42 U.S.C. §2000e-3 (quoted *supra.*). Stouder argues that the difference in the language of the two provisions indicates a Congressional intent to provide less coverage for retaliation than for other forms of discrimination under the Act.

While Stouder's position has some logical appeal at first glance, we find it is ultimately not persuasive. First, while the courts in *Doe, Gomez,* and *Sibley Mem. Hosp.* do rely, to some extent, on the "any individual" language of §2000e-2, this language is not the sole basis of these holdings. For example, in *Sibley Mem. Hosp.,* the court makes much of the fact that the general remedial section of Title VII does not refer only to any "employee" but provides recourse to "persons aggrieved." *See* 42 U.S.C. §2000e-5(b); 488 F.2d at 1341-42; *see also Gomez,* 698 F.2d at 1021. The court states: "The fact that the Act purports to provide remedies for a class broader than direct employees is a strong indication that the proscriptions contemplated by [§2000e-2] reach beyond the immediate

employment relationship." *Sibley Mem. Hosp.*, 488 F.2d at 1341. It is important to note that the remedial section to which the court refers, §2000e-5, applied equally to plaintiffs suing under §2000e-2 and §2000e-3. Thus, the courts in reaching their conclusions in *Sibley* and *Gomez,* were not relying on the "any individual" language of §2000e-2, but rather, were discerning the meaning of "employee" in the Title VII context by looking to the intent and scope of Title VII as whole.

In addition, as discussed above, *Sibley Mem. Hosp.* extensively discusses the fact that §2000e-2 applies to unions and employment agencies whose actions might interfere with a person's access to employment opportunity with other employers though these organizations might not be serving as an employer. Significantly, §2000e-3 also explicitly applies to unions and employment agencies. Thus, if the analogy between the hospital's interference with Christopher's employment [11] as a private scrub nurse in the instant case, and the interference by a union or employment agency in the employment opportunities of its members or clients holds, then a plaintiff alleging interference by a defendant in the plaintiff's employment with third parties ipso facto states a claim under either §2000e-2 or §2000e-3. *See Doe,* 788 F.2d at 423 ("Congress presumably did not intend to allow the hospital to exploit its power to grant or deny staff privileges in order to discriminatorily interfere with [plaintiff's] employment opportunities."); *see also Pao v. Holy Redeemer Hosp.*, 547 F.Supp. 484, 494-95 (E.D. Penn. 1982) (following *Sibley Mem. Hosp.* to find that hospital's denial of staff privileges to a doctor was sufficient to state a claim under Title VII).

In the instant case, there was ample evidence presented at trial to demonstrate that Stouder was an organization which was capable of and in fact did affect Christopher's ability to engage in her employment as a scrub nurse. As the trial court put it,

> By discriminating against Plaintiff and refusing to grant her privileges to work in its facility, Defendant realistically

> prevents Plaintiff from performing the job for which she was hired by the physicians. This clearly interferes with Plaintiff's employment relationship with the hiring physicians and with her opportunity to perform her work.

J. App. at 73 (Order denying motion for new trial). As the goal of Title VII is to preserve employment opportunity, we can see no reason to conclude that Congress intended Title VII to prohibit discrimination by a non-employer defendant on the basis of race or sex, and to allow the same non-employer defendant to discriminate against a person who engages in protected activity under Title VII. In both instances the acts of the non-employer defendant have the effect of denying the plaintiff employment based upon impermissible grounds under the Act. Thus, we find that the trial court had jurisdiction to hear Christopher's §2000e-3 claim based upon the [12] principles and reasoning articulated in *Sibley Mem. Hosp.* and its progeny.

Stouder also asserts that the trial court did not have jurisdiction to hear this case because Title VII does not apply to "independent contractors." In this argument, Stouder asserts that Christopher's relation to the hospital is analogous to that of an independent contractor. *See Falls v. Sporting News Pub. Co.*, 834 F.2d 611, 613 (6th Cir. 1987) (while the term "employee" is to be construed broadly in Title VII, it is not meant to reach independent contractors). In the instant case, the trial court specifically found that "Plaintiff would not be a hospital employee nor would she be an independent contractor with respect to the hospital." J. App. at 73. The court's finding is supported by the record. As a private scrub nurse, Christopher would not be paid by the hospital nor would she receive benefits or insurance from the hospital. Her direct employment relationship would be with the doctor who hired her to assist in surgery for each specific operation. While Stouder would provide Christopher with equipment and facilities to perform her work, Stouder would not have any control over her work, except to the extent that it could impose its uniform safety standards as it does on all persons who have staff privileges in the

hospital. Finally, at no time would Christopher be required to perform services for the hospital itself. On these facts, no contractual relationship would exist between Stouder and Christopher either as an employee or as an independent contractor.[3] For these reasons, we find that Christopher does not fall within the independent contractor exception to Title VII. [13]

In sum, we find that the trial court properly had jurisdiction over Christopher's claims.

III.

Stouder next argues that the trial court did not apply the correct legal standards in concluding that Christopher had made out a case of retaliation under Title VII. Specifically, Stouder contends that the trial court failed to find that Christopher was "otherwise qualified" for the position she was allegedly denied based upon retaliation, and that Christopher failed to show that the Stouder hired a less qualified scrub nurse after her application was denied.

As the trial court correctly noted, the elements of a prima facie case of retaliation are as follows:

> (1) that plaintiff engaged in an activity protected by Title VII; (2) that the exercise of his [or her] civil rights was known by the defendant; (3) that, thereafter, the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action.

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[3]The fact that Christopher is neither Stouder's direct employee nor of an independent contractor does not undermine the fact that Stouder has exclusive control over Christopher's ability to practice as a private scrub nurse. As described above, even though Christopher does not provide any services for the hospital, her ability to function as a private scrub nurse is contingent upon Stouder's grant of limited privileges. Thus, while Christopher's relationship with Stouder is not contractual, she nevertheless states a claim under Title VII based upon her allegations that Stouder's acts of retaliation prevented her from entering into employment contracts with private doctors.

*Wrenn v. Gould,* 808 F.2d 493, 500 (6th Cir. 1987). Based upon this framework, the trial court found that Christopher had met her prima facie burden. Stouder argues that the trial court erred in applying this framework alone, without making the other findings required for a prima facie case of discrimination under Title VII under *McDonnell Douglas v. Green,* 411 U.S. 792, 802 (1972). *Wrenn* made clear that "[p]roof of a retaliation claim under Title VII is governed by *McDonnell Douglas*[.]" *Wrenn,* 808 F.2d at 500. Key to a finding of discrimination under the *McDonnell Douglas* framework is proof that the plaintiff "applied and was qualified for a job for which the employer was seeking applicants," and "that, despite his qualifications, he was rejected". 411 U.S. at 802. Stouder argues that [14] Christopher's retaliation claim is fatally flawed because she failed to meet her burden of demonstrating that she was qualified to receive limited privileges as a private scrub nurse. In addition, Stouder asserts that the trial court, in finding that Christopher had made out her claim of retaliation, never made an explicit finding that Christopher was qualified for the position.

After weighing the testimony and evidence before it, the trial court concluded that "Mrs. Christopher has persuaded this Court that she would have received limited privileges but for retaliation against her on the basis of her prior claim against Wright State." J. App. at 30-31. Christopher argues that the trial court's finding that she would have received limited privileges but for Stouder's retaliationis an implicit finding that she was qualified to perform the job of a scrub nurse. However, as Stouder points out, the court seemed to have serious doubts about Christopher's qualifications. For example, at the end of its memorandum opinion the court stated

> Ms. Christopher seeks reinstatement of her limited privileges and to that she is entitled. Stouder is, however, entitled to ensure that she is *technically competent as a scrub nurse, since there were some valid concerns expressed about that at the time she was at the hospital* and it has now been two and one-half years since she has acted

> in that capacity. Accordingly, counsel for the parties are directed to consult with a view to devising a neutral objective measurement of Ms. Christopher's present competence to act as a scrub nurse.

J. App. at 33-34 (emphasis added). In addition, the court prescribed a six-week trial procedure to determine Christopher's qualifications for the scrub nurse position. This procedure required medical evaluators to observe Christopher and file reports. As to the reports, the court stated that, "[e]ach such report shall include the doctor's opinion as to whether Mrs. Christopher is qualified for employment as a gynecological and obstetrical private [15] duty scrub nurse." *Id.* at 46.

Christopher argues that the court was primarily concerned with her present qualifications as it had been several years since she acted as a nurse due to this litigation. However, the court specifically noted that there had been some valid concerns about her qualifications at the time she was at the hospital. *Id.* at 33-34. Further there is little or no evidence in the record that demonstrates Christopher's qualifications to act as a private scrub nurse, and this evidence came from her husband and her husband's partner. As Stouder correctly points out, "Congress did not intend by Title VII . . . to guarantee a job to every person regardless of qualifications." *Griggs v. Duke Power Co.,* 401 U.S. 424, 430 (1971). Further, "qualification of the complainant is the pivotal component of the *McDonnell Douglas* prima facie case." *Williams v. Boorstin,* 663 F.2d 109, 118 (D.C. Cir. 1980) (emphasis omitted), *cert. denied,* 451 U.S. 985 (1981). Thus, we hold that is was error for the trial court not to make an explicit finding that Christopher was qualified to act as a scrub nurse before concluding that she was the victim of discrimination. We therefore remand for the district court to determine whether Christopher was qualified to act as a private duty scrub nurse at the time the alleged discrimination took place.

In addition to its assertions regarding the trial court's failure to find that Christopher was qualified, Stouder asserts that the district

court erred in failing to require Christopher to show that other less qualified applicants were granted privileges at Stouder after she was denied such privileges. As Stouder correctly points out, the Supreme Court in *McDonnell Douglas* suggested that plaintiffs seeking to create an inference of discriminatory failure to hire must show, in addition to membership in a protected class and qualifications, that the defendant continued to accept applicants for the position from equally qualified person. 411 U.S. at 802. However, Stouder's premise that failure to make such a finding is [16] reversible error is based upon a misapprehension of the law.

It is well settled that if a plaintiff presents direct evidence of discrimination, she need not proceed under the *McDonnell Douglas* formula. *Blalock v. Metal Trades, Inc.*, 775 F.2d 703, 707 (6th Cir. 1985). As the court explained,

> Direct evidence and the *McDonnell Douglas* formula are simply different evidentiary paths by which to resolve the ultimate issue of defendant's discriminatory intent. "Where the evidence for a prima facie case consists . . . of direct testimony that defendants acted with a discriminatory motivation, if the trier of fact believes the prima facie evidence the ultimate issue of discrimination is proved; no inference of discrimination is required."

*Id.* (citations omitted). In the instant case, the trial court found that Stouder raised its prior qualifications standards and denied Christopher limited privileges in retaliation for her prior sex discrimination suit. The court based its finding upon Christopher's own testimony of discussions she had had with Dr. Hess and Grubb, and the fact that reference to Christopher's prior suit appeared in Dr. Hess's memo to the Executive Committee. Thus, there was direct evidence upon which the court could find that Stouder acted in a discriminatory manner with regard to Christopher. In other words, there was no need for Christopher to produce evidence of retaliatory motive under the *McDonnell Douglas* framework because the court did not have to infer from Stouder's

actions with other applicants that the hospital discriminated in this case.

Stouder also argues that since Christopher's privileges were denied, the hospital has not granted privileges to any private scrub nurse who did not have at least one year of experience. Thus, Stouder argues, it has not [17] discriminated against Christopher. Rather, the hospital has simply applied its neutral qualification standards across the board to all applicants. However, even if we accept Stouder's claims that it has consistently applied the one year experience standard to applicants after Christopher, this still does not refute the evidence that the hospital raised its prior standards in Christopher's case in order to deny her privileges for impermissible reasons of retaliation. Therefore we find that the trial court's determination that Stouder acted with a retaliatory motive is not clearly erroneous.

IV.

Stouder's last contention is that the trial court mistakenly found that Stouder's new standards for the hiring of private scrub nurses, written by Ms. Nagle, were retaliatory because Ms. Nagle testified that she did not know that Christopher had filed a prior discrimination action. As Christopher points out, this alleged error is based upon a misapprehension of what the trial court found. In fact, the court did not determine that the writing of the standards was retaliatory, although it hinted that they may have been written to include a one year experience requirement which would exclude Christopher. Rather, the discriminatory act was the application of these new higher standards to Christopher by the Executive Committee and other decisionmakers. It was this application of the standards which "differed substantially from the bases upon which Stouder had in the past hired scrub nurses into its own employment", which evidenced Stouder's discriminatory purpose. J. App. at 75. Therefore we find that the court's finding that the standards used to deny Christopher's application were employed for a retaliatory purpose was not clearly erroneous. [18]

V.

On cross-appeal, Christopher challenges the trial court's failure to grant her back pay damages on her retaliation claim. As Christopher points out, this court has held that:

> The finding of discrimination by the district court, in addition to the nature of the relief (compensatory as opposed to punitive), and the clear intent of Congress that the grant of authority under Title VII should be broadly read and applied mandate an award of back pay unless exceptional circumstances are present.

*Head v. Timken Roller Bearing Co.*, 486 F.2d 870, 876 (6th Cir. 1973). Moreover, this court has held that mere difficulty in calculating the amount of the pay award does not constitute "exceptional circumstances" such as would justify the denial of back pay. *Rasimas v. Mich. Dep't of Mental Health*, 714 F.2d 614, 626 (6th Cir. 1983), *cert. denied*, 466 U.S. 950 (1984). However, an "[a]ward of back pay is not an automatic or mandatory remedy but is within the discretion of the [Trial] Court." *Kennerly v. ARO, Inc.*, 447 F.Supp. 1090, 1101 (E.D. Tenn. 1987) (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975)). Christopher argues that the trial court had no recognizable justification for denying back pay.

The trial court addressed the issue of back pay twice in its various post trial orders. In its original memorandum opinion, the court found that Christopher was not entitled to back pay for two alternative reasons. First, the court asserted that it was not entitled to granted compensatory damages under Title VII and that since Stouder was not Christopher's employer and would not have paid her salary, it could not be charged with back pay damages. Second, the court noted that "the proof of loss with respect to that potential employer was quite sketchy." J. App. at 33.

Subsequently, the court amended its prior findings of [19] fact and conclusions of law on the back pay issue. In its amended

findings, it first noted that it was in error as to its inability to grant a back pay award against Stouder. However, the court explained and affirmed its findings as to the inconclusive nature of the proof on back pay. The court stated:

> [T]he testimony was very vague about what the arrangement [between Christopher and her husband and his partner] was going to be. The Court's notes reflect no testimony from Ms. Christopher about a pay arrangement. Dr. Dysert testified that [the partnership was] still trying to save for a laser [for surgery] and probably would have started Ms. Christopher out at $1.00. Dr. Christopher admitted there was no agreement about what to do, but thought her salary probably would be $12,000 per year when she sent on the doctor's payroll.
>
> • • •
>
> The extreme ambiguity of the intended arrangement as outlined above shows Plaintiff did not prove what she actually would have received. Nor was there any proof of what other private duty nurses are paid so as to permit finding an average. Plaintiff did not even suggest in her Proposed Findings of Fact and Conclusions of Law an amount of lost wages from the intended arrangement. While back pay in a Title VII case need not be proven with the exactitude of lost profits in a breach of contract case, neither can such an award be appropriately founded on mere speculation.

J. App. at 37-38. Based upon these findings, we find that the court did not abuse its discretion in denying back pay in this case. Therefore, we affirm the denial of back pay.

## VI.

For the foregoing reasons, we **REMAND** for the trial [20] court to make specific findings as to Christopher's qualifications to perform as a private scrub nurse at the time she was denied privileges. We **AFFIRM** the findings of the trial court in all other respects. [21]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

ANASTASIA S. CHRISTOPHER,

Plaintiff, : Civil Action No. C-3-87-249

- vs - Magistrate Merz

STOUDER MEMORIAL HOSPITAL,

Defendants. :

ORDER DENYING MOTION FOR NEW TRIAL AND SETTING PROCEDURES CONCERNING SUPERSEDEAS BOND

This case is before the Court on Defendant's Motion for a New Trial. (Doc. 55).

This action was tried to the United States Magistrate in July, 1988, sitting without a jury and with the consent of the parties pursuant to 28 U.S.C. §636(c). On July 5, 1988, the Court entered its Memorandum Opinion and Decision embodying findings of fact and conslusions of law under Fed. R. Civ. P. 52. (Doc. 22). The Court found, *inter alia*, that Plaintiff had been denied limited staff privileges as a private duty scrub nurse at Defendant's facility in retaliation for her prior protected activity under Title VII and also found that she was entitled to reinstatement of those limited privileges.

Defendant filed the present motion pursuant to Fed. R. Civ. P. 59 and moved the Court for a new trial on the basis that the Court lacks jurisidiction in this matter. Specifically, Defendant argues that the position to which Plaintiff aspired - - that of a private duty scrub nurse - - is clearly that of an independent contractor and therefore the protections of Title VII are not available.

In her Memorandum in Opposition, Plaintiff argues that

Defendant had consistently maintained that Plaintiff was in fact, Defendant's employee (a "pool nurse") throughout the relevant time period. Plaintiff also argues that a formal employer - employee relationship is not needed for Title VII protections to be available but rather, a Plaintiff is protected against discrimination if the Defendant is one who significantly affects access of any individual to employment opportunities. Finally, Plaintiff argues that even if she was not an employee at the time of the retaliatory acts she was at least a former employee and Title VII protections are available when a claim of retaliation is brought by a former employee.

In reply, Defendant cites to numerous cases where courts have held that Title VII protections were not available because no employee status was established. Defendant essentially repeats its argument that Plaintiff was an independent contractor and therefore Title VII protections are not available to her.

Title VII makes it an unlawful employment practice for an employer to discriminate against any of its employees or applicants for employment because she has opposed any practice made unlawful by Title VII, or because she has made a Title VII charge. *See*, 42 U.S.C. §2000e-3.

Title VII defines "employee" in broad language: "the term 'employee' means an individual employed by an employer . . ." 42 U.S.C. §2000e(f). The legislative history supports the view that Congress intended to cover the full range of workers who may be subject to the harms the statute was designed to prevent, unless such workers are excluded by a specific statutory exception. *Armbruster v. Quinn,* 711 F.2d 1332, 1339 (6th Cir. 1983). The term 'employee' in Title VII "must be read in light of the mischief to be corrected and the end to be attained." *Id.* at 1340 (citation omitted). The mischief to be corrected is that discrimination in employment opportunity has been made unlawful by Title VII's violation provisions; the end, to rid from the world of work of the evil of discrimination because of an individual's race, color, religion, sex or national origin. *Id.* Since the statute has been

universally held to be broadly remedial in its purpose, such remedial effect can be given only upon a broad interpretaton of the term 'employee'. *Id.* at 1341. One must examine the economic realities underlying the relationship between the parties in an effort to determine whether an individual is likely to be susceptible to the discriminatory practices which the Act was designed to eliminate. *Id.* at 1340. In view of the broad terms of Title VII, reasonably precise exceptions, and legislative history all directed towards a test of coverage to all those who are in a position to suffer the harm the statute is designed to prevent, unless specifically excluded, where there is a doubt or ambiguity, it should be resolved in favor of coverage. *Id.* at 1341.

Although the Sixth Circuit has rejected a narrow construction of the term 'employee' under Title VII, is has nevertheless adhered to a standard that would exclude from the protection of Title VII a person who cannot be considered an employee but is instead clearly an independent contractor. *Falls v. The Sporting News,* 834 F.2d 611 (6th Cir. 1987) (citations omitted).

There is no question that if Plaintiff was Defendant's employee at the time of the discriminatory acts then Title VII protections are available to Plaintiff. However, for the reasons stated more fully below, this Court does not need to make a determination of whether Plaintiff was Defendant's employee at the time of the unlawful acts.

This Court finds that as a private scrub nurse, Plaintiff would not be an independent contractor with respect to Defendant. In the capacity of private scrub nurse, Plaintiff would perform no services for Defendant nor would she be paid by defendant for any services. Plaintiff would perform services for the physicians by whom she would be employed. Accordingly, the *Falls*, 'independent contractor exception' is not applicable in this case.

The facts of this case are strikingly similar to those in *Sibley Memorial Hospital v. Wilson*, 488 F.2d 1338 (D.C. Cir. 1973). In *Sibley*, the plaintiff was a male private duty nurse who worked in a

private hospital and who obtained employment with patients by referral through a nurses' registry. When a patient needed a private duty nurse, the hospital's nursing office would communicate the request to the registry. Neither the hospital nor the registry was permitted to discriminate on the basis of sex. The registry would match the patient with an available nurse, and the nurse would report to the patient. If the nurse was unacceptable to the patient for any reason, the patient would still be required to pay the nurse one day's wages. The plaintiff complained that supervisory nurses at the defendant hospital has themselves rejected him and prevented him from reporting to the patient when the patient was a female.

The court in *Sibley* held that the plaintiff had a Title VII claim, despite the absence of an employment relationship between the nurse and the hopsital. The court first noted that in Title VII Congress had intended to "achieve *equality of employment opportunities.*" *Sibley*, 488 F.2d at 1340-41 (emphasis in original) (citations omitted).

> Control over access to the job market may reside, depending upon the circumstances of the case, in a labor organization, an employment agency, or an employer as defined in Title VII; and it would appear that Congress had determined to prohibit each of these from asserting any power it may have to foreclose, on invidious grounds, access by any individual to employment opportunities otherwise available to him. To permit a covered employer to exploit circumstances peculiarly affording it the capability of discriminatorily interfering with an individual's employment opportunities with another employer, while it could not do so with respect to employment in its own service, would be to condone the continued use of the very criteria for employment that Congress has prohibited.

Id. at 1341.

In *Sibley*, the private nurse was not the hospital's employee nor was he an independent contractor with respect to the hospital.

Although the hospital provided equipment, supplies, a place for him to perform his work and presumably imposed standards, his employment relationship was with the patients and not with the hospital. However, the hospital was in the position to interfere with his employment relationships and opportunities and the court found that was sufficient for Title VII protections to attach.

In the present case, as a private scrub nurse, Plaintiff would not be a hospital employee nor would she be an independent contractor with respect to the hospital. As in *Sibley*, although Defendant would provide Plaintiff with equipment, supplies, instruments, a place for her to perform her work, and impose standards, Plaintiff's employment relationship would be with the physicians for whom she works. However, and again as in *Sibley*, Defendant was in a position to interfere with Plaintiff's employment relationship and opportunities. By discriminating against Plaintiff and refusing to grant privileges to work in its facility, Defendent realistically prevents Plaintiff from performing the job for which she was hired by the physicians. This clearly interferes with Plaintiff's employment relationship with the hiring physicians and with her opportunity to perform her work. Therefore, Title VII projections are available to Plaintiff and this Court has jurisdiction of her Title VII claims.

For all of the foregoing reasons, this Court finds that Title VII protections are available to Plaintiff and therefore this Court has jurisdiction over Plaintiff's Title VII claims. Accordingly, Defendant's Motion for a New Trial is not well taken and is overruled.

It is therefore ORDERED that Defendant's Motion for a New Trial is overruled.

This case is also before the Court upon Defendant's Motion to Stay Execution of Judgment pending decision on the motion for a new trial (Doc. #56) and Defendant's Memorandum Requesting Clarification (Doc. #61).

At the time the motion stay execution was filed, the Court held a conference among counsel on February 20, 1990, who agreed that they would confer and agree on an amount liquidated damages which would be suffered by Plaintiff for each day or other work period she missed pending decision on the motion for new trial and presumably pending appeal. On March 27, 1990, Plaintiff's counsel reported to the Courts clerk that the parties had been unable to agree on an amount of liquidated damages, but continued to agree in principle on that approach.

Defendant has now filed a Memorandum Requesting Clarification (Doc. #61) which in its penultimate paragraph asks this Court to amend the judgment and enter judgment for Defendant on the grounds that Plaintiff is not qualified as a private duty scrub nurse.

The memorandum, which is in reality a motion to amend the judgment, is untimely. Under Fed. R. Civ. P. 59(e), such a motion must be filed not later than ten days after the entry of judgment, which occured February 5, 1990.

Moreover, the reasoning of the Memorandum is flawed. It repeats the observation that Ms. Christopher does not meet Stouder's present standards for private duty scrub nurse nursing, but the Court previously found that those standards were developed as part of Stouder's discrimination against Stacy Christopher: they were written in a way which made her ineligible, but differed substantially from the bases upon which Stouder had in the past hired scrub nurses into its own employment.

Defendant argues that Ms. Christopher does not meet the standards of other area hospitals, and that is apparently true. However, those hospitals did not develop their standards as part of a discriminatory pattern and they are not defendants in this action.

Defendant also argues that Ms. Christopher has not been in an operating room for over four years. However, it is Stouder Hospital which has adamantly fought Ms. Christopher's return to the

operating room since this litigation was filed.

When the Court made its initial decision on liability, it attempted to accommodate Stouder's concerns about Ms. Christopher's technical competence by getting that competence certified by disinterested outside experts. That process turned out not to be feasible. During that entire process, Stouder has refused to compromise at all.

The Court reiterates its prior Order: Defendant shall grant the Plaintiff limited private duty scrub nurse privileges in accordance with her application of March 26, 1986. Without modifying that judgment, the questions presented by Defendant for interpretation are answered as follows:

1. Stouder may require Plaintiff to fill out an updated application to the extent that such application is for information gathering. The application to be granted is that of March 26, 1986.
2. Stouder may verify Mr. Christopher's licensure.
3. Stouder may not request up-to-date references.
4. Stouder may inquire about continuing education, but may not refuse privileges on the basis of any answer. Once privileges are granted, Ms. Christopher may be required to fulfill any continuing education requirement imposed by Stouder on private duty scrub nurses equally.
5. Stouder may require proof of insurance to the same extent it does with other private duty scrub nurses.
6. Ms. Christopher is not required to meet current criteria.

Although the Court urges the parties to negotiate an end to this controversy, the Court assumes that Defendant intends to appeal. If a notice of appeal is filed, the Court wishes to indicate its willingness to stay execution pending appeal upon the posting of a supersedeas bond in an amount double the reasonably expected annual income of Ms. Christopher is she were permitted to work. Since the Court understands the parties have been unable to reach an agreement on what that amount would be, on request of either

party the amount supersedeas bond will be set for prompt hearing.

UNITED STATES MAGISTRATE

Filed March 30, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

ANASTASIA S. CHRISTOPHER,

Plaintiff, : Civil Action No. C-3-87-249

- vs - Magistrate Merz

STOUDER MEMORIAL HOSPITAL,

Defendant. :

JOURNAL ENTRY MODIFYING DECISION ON REMEDY

This action was tried to the United States Magistrate in July, 1988, sitting without a jury and with the consent of the parties under 28 U.S.C. §636(c). On July 25, 1988, the Court entered its Memorandum Opinion and Decision embodying findings of fact and conclusions of law under Fed. R. Civ. P. 52.

The Court determined that Plaintiff had been denied limited staff privileges as a private duty scrub nurse at Defendant's facility in retaliation for her prior protected activity under Title VII and found that she was entitled to reinstatement of her limited privileges. It directed the parties to negotiate a neutral objective measurement of her technical competence as a scrub nurse (Doc. #22).

The parties were unable to agree and the Court held a hearing remedy on October 31, 1988. On March 6, 1989, the Court adopted Plaintiff's proposal that she work under the supervision of a neutral obstetrician/gynecologist for six weeks and obtain his or her report on her competence (Doc. #47).

Plaintiff now reports to the (Doc. #50) that despite diligent effort she has been unable to carry out this plan. From her report, she is in a "Catch 22" situation: she cannot obtain limited privileges

at Good Samaritan Hospital so as to work with the doctors the Court has approved, probably because of her prior legal difficulties, although this has not yet been proven.

What has been proven to the Court's satisfaction is that its earlier decision on remedy is flawed. The Court has determined that Plaintiff was unlawfully deprived of limited privileges at Stouder and is entitled to their restoration (Doc. #22). Plaintiff's good faith efforts and Defendant's prior inability to suggest a workable alternative convince the Court that it must now order restoration of the privileges without further processing of the Plaintiff.

It is accordingly ordered that Defendant grant Plaintiff limited staff privileges as a private duty scrub nurse in accordance with her application of March 25, 1986. Such privileges shall permit her to work as a private duty scrub nurse only for those doctors who desire her services in that capacity and who themselves compensate her directly for her services and maintain adequate malpractice insurance covering her work. In other words, it is not the Court's intention to compel Stouder to enter into an employment relationship with Ms. Christopher. It is the Court's understanding from the hearing on remedy that this is exactly the way in which other private duty scrub nurses are treated at Stouder.

UNITED STATES MAGISTRATE

Filed February 5, 1990

Supreme Court, U.S.
FILED
NOV 22 1991
OFFICE OF THE CLERK

(2)

Case No. 91-684

In The

# Supreme Court of the United States

October Term, 1991

STOUDER MEMORIAL HOSPITAL,

*Petitioner*

v.

ANASTASIA S. CHRISTOPHER,

*Respondent*

**Petition For a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTION FOR REVIEW

Whether a party who was an employee of a hospital and had been granted temporary privileges as a scrub nurse but later denied privileges can be an "employee or applicant for employment" for jurisdictional purposes under 42 U.S.C. § 2000 e-3.

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In the Supreme Court of the United States

October Term

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Stouder Memorial Hospital, Petitioner,

v.

Anastasia S. Christopher, Respondent

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Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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## OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit filed on June 24, 1991, is reported at 936 F. 2d 870 and is included in the Appendix hereto. The July 24, 1991 judgment denying Petitioner's request for a rehearing also is in the appendix hereto. The opinions of the United States District Court, Southern District of Ohio are also included in the Appendix.

## STATEMENT OF THE CASE

Ms. Christopher, a female nurse, was awarded a B.S. degree in nursing from The Ohio State University in 1974 and a M.S. degree in nursing from the same institution in 1977, with particular emphasis in maternal and child health. (A.4)

From 1978 until 1983, Ms. Christopher was a faculty member at the Wright State University School of Nursing. In June 1983, she filed a sex discrimination claim against Wright State. Her claim eventually resulted in a Title VII lawsuit which was resolved prior to trial. (A.4)

Ms. Christopher, and her husband Dr. Charles Christopher, M.D. decided to move to Troy, Ohio after their problems at Wright State University. Dr. Christopher formed a partnership with Dr. Gerald Dysert, and they then performed deliveries and gynecological surgery at Stouder

Memorial Hospital (hereinafter "Stouder"). (A.5)

Stouder hired Ms. Christopher on June 10, 1985. Her formal title was "pool nurse". She also worked as an instructor for other nurses in the Ob/Gyn department. (A.5)

One of Ms. Christopher's duties during her employment at Stouder was to prepare the obstetrical nurses to assist as scrub nurses during cesarean section procedures. Ms. Christopher had no prior experience as exclusively a scrub nurse, but she had previously assisted in surgery at a different hospital. (A.6)

Therefore, Ms. Christopher received her training as a scrub nurse in July and August of 1985 in the Stouder operating room. Ms. Christopher was to then instruct the other nurses in obstetrics, instead of the hospital sending them out to a

different hospital for training. (A.6)

In July, 1985 Christopher applied to Stouder to obtain limited privileges to act as a private scrub duty nurse at the hospital. The procedure for deciding on privileges was that the application would remain with the medical staff secretary until complete. The application would then be passed on to the Executive Committee of the Medical Staff, then to the full medical staff and finally to the Board of Trustees. During the period in which the application was being considered, the hospital's president was empowered to grant temporary privileges for a period of ninety days. The Executive Committee approved this request on August 6, 1985, and John Grubb, President of Stouder, granted Christopher temporary privileges on October 23, 1985. (A.7)

After her temporary privileges were

granted, Christopher began to act as a private scrub nurse for her husband and his partner.

Private duty scrub nurses are normally paid by the doctors with whom they work. They are not employees of the hospital itself, and the hospital does not cover their insurance or benefits. However, during her training period, and during the tenure of her temporary privileges status, Christopher was paid and insured by the hospital. (A.8)

In January, 1986, Ms. Swisshelm hired a special obstetrics supervisor to perform the training tasks Christopher was hired to perform. Mr. Grubb approved this new plan, and on January 10, 1986, Christopher was informed that her services as a clinical nurse specialist would no longer be needed. Ms. Christopher has never been terminated as a "pool nurse" she has just never been

called to work. (A.5, A.105)

Ms Christopher then applied for limited privileges to act as a scrub nurse for her husband and Dr. Dysert.

In processing the application for limited privileges, Dr. Mark Hess, a member of the Executive Committee at Stouder wrote a memorandum to the Executive Committee which disclosed in part a conversation he had with L.R. Jordan, Chief Executive of Miami Valley Hospital, Ms. Christopher's prior place of employment. The memorandum in part, disclosed the fact that Ms. Christopher had sued Miami Valley Hospital for sex discrimination. (A.11)

On February 4, 1986 the Executive Committee voted to deny Ms. Christopher's application for limited privileges. Her renewed application for limited privileges was denied on May 6, 1986. (A.13)

Ms. Christopher testified about an

uncontroverted conversation she had with Dr. Hess in January 1986 when he admitted to Ms. Christopher that "If you hadn't some legal action prior to this, this might not have occurred." She also testified about a second uncontroverted conversation she had with Dr. Hess on March 9, 1986 in which he told her that she was having problems because of her prior legal action at Miami Valley Hospital. (A.14)

While the court dismissed all of Ms. Christopher's other claims at the close of plaintiff's case, it found that she had established her claim of retaliation. In reaching this result the court found that Ms. Christopher's prior sex discrimination action had been mentioned enough times in the process surrounding her applications for limited privileges to warrant a conclusion that Stouder would not have made the same decision absent the factor of the prior suit.

Stouder has consistently been speaking from both sides of its mouth throughout the course of the instant litigation. On one hand it produces evidence at trial that Ms. Christopher was <u>still</u> an employer of Stouder (A.105). On the other hand it now argues there is no employment relationship between Stouder and Ms. Christopher.

The Sixth Circuit correctly affirmed the trial courts opinion. This Court should now deny the Petitioner's application for Writ of Certiorari.

## ARGUMENT

The Petitioner claims the instant case is one of first impression because the cases addressing the issue of who is protected under Title VII concern 42 U.S.C. § 2000 e-2(a)(1) and not 42 U.S.C. § 2000 e-3(a). The Petitioner's argument is flawed for three reasons.

The first reason the Petitioner's argument is flawed is because it ignores the overall, underlying purpose of Title VII.

As the District Court noted and the Sixth Circuit Court of Appeals affirmed: "[t]he term 'employee' in Title VII 'must be read in light of the mischief to be corrected and the end to be attained.'" (quoting Armbruster v. Quinn, 711 F. 2d 1332, 1340 (6th Cir. 1983)). In other words, a hypertechnical, literal interpretation of Title VII's provisions

will not be countenanced if to do so would defeat the purpose of the Act-freedom from employment discrimination. To this end, courts have time and time again held that in Title VII cases there need not be a formal common law employer-employee relationship. Rather, a Plaintiff is protected against discrimination if the Defendant is one "who significantly affects access of any individual to employment opportunities ..." Doe v. St. Joseph's Hosp., 788 F.2d 411, 424 (7th Cir. 1986). See also, Gomez v. Alexian Bros. Hosp., 698 F.2d 1019 (D.C. Cir. 1983); Pao v. Holy Redeemer Hosp., 547 F. Supp. 484 (E.D. Penn. 1982); Puntolillo v. New Hampshire Racing Comm., 375 F. Supp. 1089 (D.N.H. 1974).

"Title VII of the Civil Rights Act should not be construed narrowly" Tipler v. E.I. du Pont de Nemours and Co. 443 F2d

125, 131 (6th Cir. 1971). Therefore, it has been held by several courts that a formal employment relationship is not required.

Rather, a plaintiff is protected if the defendant is one "who significantly affects access of any individual to employment opportunities." Doe v. St. Joseph's Hosp., 788 F.2d 411, 422-25 (7th Cir. 1986) (doctor stated a claim under Title VII when hospital denied staff privileges even though doctor was not an employee of the hospital); Gomez v. Alexian Bros. Hosp., 698 F.2d 1019, 1021 (9th Cir. 1983)(finding a cause of action under Title VII when "'a defendant subject to Title VII interferes with an individual's employment opportunities with another employer.'" (quoting Lutcher v. Musicians Union Local 47, 633 F.2d 880, 883 n.3 (9th Cir. 1980)).

Sibley Memorial Hospital v. Wilson,

488 F.2d 1338 (D.C. Cir. 1973) is very similar to the case at bar. The facts in Sibley involved a male duty nurse who was not being referred cases because of his sex. He was not an employee of the hospital; however the District Court and D.C. Circuit found that in certain circumstances control over access to employment is the key factor in determining jurisdiction. The Sibley Court reasoned that:

> "The Supreme Court has said that the Congressional objective in Title VII is 'plain from the language of the statute,' and that it is 'to achieve equality of employment opportunities[.]'" Id. at 1340-41 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 429 (1969))."

Stouder argues that Sibley, Gomez, and Doe are distinguishable because all of those cases were actions brought under §2000e-2, which allows a broader range of

persons to sue than §2000e-3 upon which Christopher relies.

First, while the courts in Doe, Gomez, and Sibley Mem. Hosp. do rely, to some extent, on the "any individual" language of §2000e-2, this language is not the sole basis of these holdings. For example, in Sibley Mem. Hosp., the court makes much of the fact that the general remedial section of Title VII does not refer only to any "employee" but provides recourse to "persons aggrieved." See 42 U.S.C. §2000e-5(b); 488 F.2d at 1341-42; see also Gomez, 698 F.2d at 1021. The Sibley Court states:

> "The fact that the Act purports to provide remedies for a class broader than direct employees is a strong indication that the proscriptions contemplated by [§2000e-2] reach beyond the immediate employment relationship."

Sibley Mem. Hosp., 488 F.2d at 1341. It is important to note that the remedial section to which the court refers, §2000e-5,

applies equally to plaintiffs suing under §2000e-2 and §2000e-3. Thus, the courts in reaching their conclusions in Sibley and Gomez, were not relying on the "any individual" language of §2000e-2, but rather, were discerning the meaning of "employee" in the Title VII context by looking to the intent and scope of Title VII as a whole.

In the instant case, there was ample evidence presented at trial to demonstrate that Stouder was an organization which was capable of and in fact did affect Christopher's ability to engage in her employment as a scrub nurse. As the trial court put it,:

> "By discriminating against Plaintiff and refusing to grant her privileges to work in its facility, Defendant realistically prevents Plaintiff from performing the job for which she was

> hired by the physicians. This clearly interferes with Plaintiff's employment relationship with the hiring physicians and with her opportunity to perform her work." (A.73)

To accept the Petitioner's argument would clearly vitiate the purpose of the act. There can be no doubt that Stouder's action in denying privileges to Ms. Christopher is preventing Ms. Christopher from working at Stouder. The economic realities of the instant case are that Stouder has successfully prevented Ms. Christopher from pursuing her livelihood. Even using the test proposed by the Petitioner, i.e., the economic realities test found in Spirides v. Reinhardt, 613 F2d 826 (D.C. Cir. 1979); there can be no

doubt that the District Court has jurisdiction.

The second reason why the Petitioner's argument is flawed is because the Respondent was an employee of Stouder.

Stouder has consistently maintained that Mrs. Christopher's status as an employee of the hospital (i.e., a "pool nurse") never changed. For example, the third paragraph of Defendant's Answer (R. 19, Answer) denied Respondent's allegation that "on or about January 10, 1986, Plaintiff's employment was terminated by Defendant Stouder Memorial Hospital." (See R. 1: Complaint at paragraph 12). Further, at the trial herein, Petitioner itself elicited testimony (Sarah Swisshelm A.105), in an effort to show that Respondent's position as a "pool nurse" remained unchanged during the relevant time period. As a result, Stouder cannot now

argue that Respondent was not an "employee" entitled to Title VII protection merely because "the position to which Respondent aspired" may not have fallen within a strict common law employer-employee relationship.

The third reason the Petitioner's argument is flawed is because there is absolutely no question that Ms. Christopher was a former employee of Stouder.

Time and time again, courts have held that a claim of retaliation is just as valid when it is brought by a former employee as when it is brought by a current employee. See, e.g., Baily v. USX Corp., 850 F.2d 1506 (11th Cir. 1988) (former employee entitled to protection under retaliation provisions). Pantchecko v. C.B. Dolge Co., Inc., 581 F.2d 1052 (2d Cir. 1978) (former employee entitled to bring retaliation claim for denial of

postemployment reference letters); Rutherford v. American Bank of Commerce, 565 F.2d 1162 (10th Cir. 1977) (former employee entitled to relief for retaliatory acts of former employer). See also, Dunlop v. Carriage Carpet Co., 548 F.2d 139 (6th Cir. 1977) (Former employee entitled to protection from retaliation under F.L.S.A., which defines "employee" in same manner as Title VII). Here, there is absolutely no questions that Mrs. Christopher was at least a former employee of Stouder at the time of the proven retaliation. To hold that an employer can insulate itself from a charge of retaliation by waiting until a formal employer-employee relationship no longer exists would defeat the major purpose for including retaliation as prohibited conduct under Title VII.

## CONCLUSION

It is interesting to note that the Petitioner does not claim in it's petition for Writ of Certiorari that it did not retaliate against Ms. Christopher. Instead, the Petitioner asks this Court to evade its responsibility as the protector of minorities in this Country and to vitiate the purpose of the Civil Rights Act.

The reasons for this request as suggested in Petitioner's Conclusion is that the Equal Employment Opportunity Commission and our Court system has seen "a great increase in the number of cases filed in recent years." The Petitioner fails to provide support for it's broad sweeping statement and further fails to draw a causal relationship between the instant case and the alleged" staggering number of court cases."

The Petitioner's argument is a weak attempt to play on the sympathies of this Court for a burdened Court system. The unsupported argument is not consistent with the general purpose of the Civil Rights Act and does not require this Court to grant Petitioner's Writ of Certiorari.

Respectfully submitted,

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## APPENDIX


1. Judgment Denying Rehearing..... A.1

2. Decision of the Sixth Circuit Court of Appeals dated June 24, 1991..... A.2

3. Order of the District Court for the Southern District of Ohio Denying a Motion for New Trial, dated March 30, 1990..... A.51

4. Journal Entry of the District Court for the Southern District of Ohio Modifying Decision on Remedy dated February 5, 1990..... A.69

5. Decision of the District Court for the Southern District of Ohio dated July 25, 1988..... A.73

6. Transcript pages 571-572 of Sally Swisshelm..... A.105

Case Nos. 90-3400/3429

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

ANASTASIA S. CHRISTOPHER

Plaintiff - Appellee Cross - Appellant

v.

STOUDER MEMORIAL HOSPITAL

Defendant - Appellant Cross - Appellee

BEFORE: JONES and SUHRHEINRICH, Circuit Judges; and FEIKENS, District Judge.

Upon consideration of the petition for rehearing filed by the appellant cross - appellee, the court concludes that the issues raised were fully considered upon the original oral argument and decision of this case,

It is ORDERED that the petition for rehearing be, and it hereby is, DENIED.

ENTERED BY ORDER OF THE COURT

ss Leonard Green, Clerk

Filed July 24, 1991

Nos. 90-3400/3429

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

---

Anastasia S. Christopher,
Plaintiff-Appellee,
Cross-Appellant,

v.

On Appeal from the United States District Court for the Southern District of Ohio.

Stouder Memorial Hospital,
Defendant-Appellant,
Cross-Appellee.

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Decided and Filed June 24, 1991

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Before: JONES and SUHRHEINRICH, Circuit Judges; and FEIKENS, Senior District Judge.*

NATHANIEL R. JONES, Circuit Judge. Defendant-appellant Stouder Memorial Hospital ("Stouder"), appeal the trial court's judgment for the plaintiff-appellee Anastasia Christopher in this Title VII

civil rights action. Christopher cross-appeals the court's refusal to award her back pay on her retaliation claim.

I.

Christopher, a female nurse, was awarded a B.S. degree in nursing from Ohio State University in 1974 and a M.S. degree in nursing from the same institution in 1977, with particular emphasis in maternal and child health. She is married to Charles Christopher, M.D., a practicing obstetrician and gynecologist.

From 1978 until 1983, Mr. Christopher was a faculty member at the Wright State University School of Nursing. In June 1983, she filed a sex discrimination claim against Wright State. Her claim eventually resulted in a Title VII lawsuit which was resolved prior to trial. No details about Christopher's charge or settlement are part of the record in this case.

During the lawsuit, Christopher's husband, Charles, was also experiencing difficulties with his hospital, where he

was head of obstetrics, and the couple decided to move to Troy, Ohio. Charles formed a partnership with Dr. Gerald Dysert, who was performing deliveries and gynecological surgery at Stouder when Dr. Christopher joined him in practice.

During the spring of 1985, Ms. Christopher was hospitalized for surgery at Stouder. During her recovery she discussed the possibility of nursing employment at Stouder with Sally Swisshelm, Director of Nursing. Christopher told Swisshelm that she had had discussions with her husband and his partner about working as a "scrub nurse" for them during surgery. Stouder hired Christopher on June 10, 1985. Her formal title was "pool nurse" although it appears she had been hired to work in some sort of capacity as a trainer for other nurses in the Ob/Gyn department.

After a brief period, Christopher's

uncertain status resulted in tension with the other nurses. This was in part because she was attempting to train nurses many of whom [2] had been at Stouder for many years. One of Christopher's duties during her work at Stouder was to prepare the obstetrical nurses to assist as scrub nurses during cesarean section procedures. Apparently, everyone agreed that Christopher herself needed training in this area, since she had very little prior experience as a scrub nurse. As a result, Christopher began to train in the Stouder operating room in July and August of 1985. The apparent plan was that Christopher would pass on her training to other nurses in obstetrics, rather than sending the nurses to another hospital for training.

In July, 1985, Christopher applied to Stouder to obtain limited privileges to act as a private duty scrub nurse at the

hospital. The procedure for deciding on privileges was than the application would remain with the medical staff secretary until complete. The application would then be passed on to the Executive Committee of the Medical Staff, then to the full medical staff and finally to the Board of Trustees. During the period in which the application was being considered, the hospital's president was empowered to grant temporary privileges for a period of ninety days. The Executive Committee approved this request on August 6, 1985, and John Grubb, President of Stouder, granted Christopher temporary privileges on October 23, 1985.

After her temporary privileges were granted, Christopher began to act as a private scrub nurse for her husband and his partner. A scrub nurse's duties are primarily to prepare instruments for surgery, to hand them to the surgeon during

the operation and to clean up after the operation. As of 1985, there were only two nurses acting in the capacity of private scrub nurse. According to Ms. Nagle, operating room supervisor, there had been only one prior experience with a private duty scrub nurse in her thirty years experience with surgery at Stouder. Normally, the procedure at Stouder was for regular nurses employed by the hospital to act as scrub nurses.

Private duty scrub nurses are normally paid by the [3] doctors with whom they work. They are not employees of the hospitals itself, and the hospital does not cover their insurance or benefits. However, during her training period, and during the tenure of her temporary privileges status, Christopher was paid and

insured by the hospital.

In January, 1986, Ms. Swisshelm concluded that the obstetrical nurses were not obtaining their new skills fast enough and hired a special obstetrics supervisor to perform the training tasks Christopher was hired to perform. Grubb approved this new plan, and on January 10, 1986, Christopher was informed that her services as a clinical nurse specialist would no longer be needed. It is not clear from the record whether Christopher was actually fired at this point, or whether she remained on the schedule as a "pool nurse."

Christopher objected to Stouder's decision and hired counsel to represent her

against the hospital. In the meantime, her temporary privileges had expired. Apparently, one of her references had not responded to the hospital's request for a reference letter because he had moved his practice. He was later contacted and Christopher's file was completed on January 26, 1986.

Before Christopher's application for limited privileges was reviewed by the Executive Committee, Ms. Swisshelm was asked to review Christopher's competence. In a memo dated January 31, 1986, she questioned Christopher's training ability and characterized her as "disruptive" and untrustworthy." She noted that Christopher had written on doctor's progress notes in [4] contravention on hospital policy even

after being advised it was inappropriate. She also asserted that Christopher had caused "chaos" in both obstetrics and surgery.

Dr. Mark Hess, a member of the Executive Committee, also prepared a memorandum on Christopher. At the request of the Chief of Medical Staff, Dr. Ellenbogen, he contacted L.R. Jordan, chief executive of Miami Valley Hospital, about Christopher's work when she was stationed there by Wright State. According to Dr. Hess's memo, Jordan said that Christopher's tenure at Miami Valley had been "marked by severe turmoil," that she had "assumed authority far beyond what was proper," including writing prescriptions for her husband's countersignature, and that she had an "endless series of conflicts with many people." He also advised that Miami Valley insisted on her transfer and she

thereupon sued for sex discrimination.

On February 4, 1986, the Executive Committee voted unanimously to deny Christopher's application for limited privileges. On March 20, 1986, Christopher "withdrew" her prior application for limited privileges and filed a second more limited application. It appears she filed the second application because she was informed that her first application had been too broad. It seems Christopher had asked for permission to do a number of procedures normally handled exclusively by doctors at Stouder. Christopher's second application was supported by recommendation letters from her husband, Dr. Dysert and Dr. Kevin Horvath, a pediatrician practicing at Stouder.

After consulting with Dr. Ellenbogen, Chief of Staff, Ms. nagle prepared a set of standards for private scrub nurses for the

hospital. These standards included a requirement that private scrub nurses have at least one year of experience as a scrub nurse. Evidently, these standards were prepared in February, 1986, but were not approved by the hospital until 1987. Nonetheless, the standards were used to prepare a questionnaire for the other surgery nurses to review Christopher's [5] qualifications. Virtually, all of the nurses surveyed found that Christopher was deficient with respect to the standards. These results were made available to the Executive Committee which on May 6, 1986, again voted to deny Christopher limited privileges.

This action followed and the parties agreed to conduct the trial before a magistrate. A trial was held from July 11-13, 1988.

Dr. Hess was the only member of the

Executive Committee to testify at trial. During his testimony he denied that he had considered Christopher's prior Title VII lawsuit for sex discrimination at Miami Valley in deciding how to vote on Christopher's privileges application. However, the magistrate credited testimony by Christopher as to two conversations she had had with Grubb and with Dr. Hess. Christopher testified that she had talked to Grubb by telephone in January of 1986 and attempted to negotiate the issue of her privileges. he reportedly responded, "If you hadn't had some legal action prior to this, this might not have occurred." J. App. at 23. Christopher also recalled a conversation with Dr. Hess on March 9, 1986, in which he reportedly also told her that she was having difficulties because of her prior legal action at Miami Hospital.

While the court dismissed all of

Christopher's other claims at the close of plaintiff's case, he found that she had established her claim of retaliation. In reaching this result the court found that Christopher's prior sex discrimination action had been mentioned enough times in the process surrounding her applications for limited privileges to warrant a conclusion that Stouder would not have made the same decision absent the factor of the prior suit. The court also noted that much of the evidence used to deny Christopher's second application "seems to have been manufactured to guarantee the result." J. App. at 31. Specifically, the court found that the scrub nurse standards drafted by Ms. Nagle required one year experience as a scrub nurse, which made Christopher [6] ineligible. The court found these standards "plainly discriminatory against the private scrub nurse concept since Mrs.

Nagle admitted on the stand that nurses were sometimes hired directly from nursing school into the operating room at Stouder." Id. Finally, the court concluded that Ms. Nagle could have easily learned that Christopher would be excluded by the one-year requirement by looking at her file.

Despite the court's finding in favor of Christopher on her retaliation claim, it found that Christopher was not entitled to back pay. While there was some initial confusion about whether the court had the authority to award back pay damages against Stouder when the hospital was not Christopher's employer, the court ultimately determined that back pay was not appropriate because Christopher had failed to prove damages.

Recognizing that the hospital had a strong interest in ensuring that Christopher was qualified to be a private

scrub nurse, and at the same time, acknowledging that the process used to evaluate Christopher had been flawed, the court ordered the parties to negotiate a neutral means for evaluating Christopher's abilities as a scrub nurse. When the parties failed to reach a reasonable solution, the court ordered that Christopher work for six weeks for two neutral doctors, who would independently evaluate her performance. When this too became unworkable, due in part to Stouder's refusal to cooperate, the court ordered that Christopher be granted limited privileges to work as a private scrub nurse at Stouder for any doctor who would employ her. The court was careful to make clear that it was not forcing Christopher into an employment relationship with the hospital. Rather, it was simply undoing the discriminatory application of heightened

standards which had been applied to Christopher.

II.

Stouder first contends that the court lacked jurisdiction to hear this case because Christopher was neither an [7] "employee" nor an "applicant for employment" at Stouder. The provision of the Civil Rights Act which enables plaintiffs to sue for retaliation provides, in pertinent part:

> (a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment...because he has opposed any practice made an unlawful employment practice by this subchapter or because he had made a charge, testified,

> assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. §2000e-3 (emphasis added). While it is true that Christopher was not a direct employee of Stouder, we find that Stouder's control over Christopher's ability to practice as a private scrub nurse sufficiently impacted her employment opportunities to bring her claims within the intended scope of §2000e-3.

As the trial court noted, our caselaw requires that "[t]he term 'employee' in Title VII 'must be read in light of the mischief to be corrected and the end to be attained.'" J. App. at 70 (Order denying motion for new trial, quoting Armbruster v. Quinn, 711 F.2d 1332, 1340 (6th Cir. 1983)). Further, we have repeatedly said the "Title VII of the Civil Rights Act

should not be construed narrowly." Tipler v. E.I. du Pont de Nemours and Co. 443 F.2d 125, 131 (6th Cir. 1971). In this spirit, several courts have held that Title VII does not required a formal employment relationship between the plaintiff and the defendant. Rather, a plaintiff is protected if the defendant is one "who significantly affects access of any individual to employment opportunities." Doe v. St. Joseph's Hosp., 788 F.2d 411, 422-25 (7th Cir. 1986) (doctor stated a claim under Title VII when hospital denied staff privileges even though doctor was not an employee of the hospital); Gomez v. Alexian Bros. Hosp., 698 F.2d 1019, 1021 (9th Cir. 1983) (finding a cause of action under Title [8] VII when "'a defendant subject to Title VII interferes with an individual's employment opportunities with another employer.'" (quoting Lutcher v.

Musicians Union Local 47 633 F.2d 880, 883 n.3 (9th Cir. 1980)).

The trial court in this case relied on the D.C. Circuit's opinion in Sibley Mem. Hosp. v. Wilson, 488 F.2d 1338 (D.C. Cir. 1973) to find that Christopher had jurisdiction to sue. Sibley Mem. Hosp. concerned a sex discrimination claim under Title VII by a private duty nurse against a hospital. The basis of the plaintiff's claim was that the hospital's Nursing Office would not refer the nurse, who was a male, to female patients who requested a private duty nurse.

This action by the hospital was in contravention of its own policy of referring patients to the next available private nurse in its register. The defendant hospital moved to dismiss on the ground that the plaintiff was not in an employer-employee relationship with the

hospital and therefore the court did not have jurisdiction to hear the claim. However, the district court found that the plaintiff stated a claim under Title VII and the D.C. Circuit affirmed.

In its Sibley Mem. Hosp. opinion, the court began by pointing out that "The Supreme Court has said that the Congressional objective in Title VII is 'plaint from the language of the statue,' and that it is 'to achieve equality of employment opportunities[.]'" Id. at 1340-41 (emphasis original) (quoting Griggs vs. Duke Power Co., 401 U.S. 424, 429 (1969)), The court then reasoned that in certain circumstances control over access to employment may reside in organizations such as union or employment agencies "which have not a remote but a highly visible nexus with the creation and continuance of direct employment relationships between third

parties." Id. at 1342; see 42 U.S.C. §2000e-2 (b) and (c). From these premises, the court reasoned: [9]

> To permit a covered employer to exploit circumstances peculiarly affording it the capability of discriminatorily interfering with an individual's employment opportunities with another employer, while it could not do so with respect to employment in its own service, would be to condone continued use of the very criteria for employment that Congress has prohibited.

Id. at 1341. The court went on to determine that the hospital, while not the plaintiff's employer was in the same position to interfere with the plaintiff's employment opportunities as unions or employment agencies, and therefore,

"neither the spirit nor, more essentially, the language of the Act" prohibited the plaintiff from proceeding against the defendant hospital. Id. at 1342.

The facts of the instant case are directly analogous to the situation in Sibley Mem. Hosp. Like the nurse in Sibley, Christopher cannot pursue her employment opportunity of working as a private scrub nurse if Stouder does not grant her limited privileges. If Stouder denies those privileges to Christopher on impermissible grounds, it is, in effect, denying her employment on impermissible grounds, despite the fact that it does not pay her salary.

Stouder argues that Sibley, Gomez, and Doe are distinguishable because all of those cases were actions brought under §2000e-2, which allows a broader range of persons to sue than §2000e-2 provides in

relevant part:

> (a) It shall be an unlawful employment practice for an employer--
>
> (1) to fail or refuse to hire...any individual, or otherwise discriminate against any individual with respect to his compensation, terms, condition, or privileges of employment[.]

42 U.S.C. §2000e-2 (emphasis added). By comparison, [10] §2000e-3 refers to the protected class as "employees or applicants for employment." See 42 U.S.C. §2000e-3 (quoted supra.) Stouder argues that the difference in the language of the two provisions indicates a Congressional intent to provide less coverage for retaliation than for other forms of discrimination under the Act.

While Stouder's position has some logical appeal at first glance, we find it is ultimately not persuasive. First, while the courts in Doe, Gomez, and Sibley Mem. Hosp. do rely, to some extend, on the "any individual" language of §2000e-2, this language is not the sole basis of these holdings. For example, in Sibley Mem. Hosp., the court makes much of the fact that the general remedial section of Title VII does not refer only to any "employee" but provides recourse to "persons aggrieved." See 42 U.S.C. §2000e-2, this language is not the sole basis of these holdings. For example, in Sibley Mem. Hosp., the court makes much of the fact that the general remedial section of Title VII does not refer only to any "employee" but provides recourse to "persons aggrieved." See 42 U.S.C. §2000e-5(b); 488 F.2d at 1341-42; see also Gomez, 698 F.2d

at 1021. The court states: "The fact that the Act purports to provide remedies for a class broader than direct employees is a strong indication that the proscriptions contemplated by [§2000e-2] reach beyond the immediate employment relationship." Sibley Mem. Hosp., 488 F.2d at 1341. It is important to note that the remedial section to which the court refers, §2000e-5, applied equally to plaintiffs suing under §2000e-2 and §2000e-3. Thus, the courts in reaching their conclusions in Sibley and Gomez, were not relying on the "any individual" language of §2000e-2, but rather, were discerning the meaning of "employee" in the Title VII context by looking to the intent and scope of Title VII as whole.

In addition, as discussed above, Sibley Mem. Hosp. extensively discusses the fact that §2000e-2 applies to unions and

employment agencies whose actions might interfere with a person's access to employment opportunity with other employers though these organizations might not be serving as an employer. Significantly, §2000e-3 also explicitly applies to unions and employment agencies. Thus, if the analogy between the hospital's interference with Christopher's employment [11] as a private scrub nurse in the instant case, and the interference by a union or employment agency in the employment opportunities of its members or clients holds, then a plaintiff alleging interference by a defendant in the plaintiff's employment with third parties ipso facto states a claim under either §2000e-2 or §2000e-3. See Doe, 788 F.2d at 423 ("Congress presumably did not intend to allow the hospital to exploit its power to grant or deny staff privileges in order to

discriminatorily interfere with [plaintiff's] employment opportunities."); see also Pao v. Holy Redeemer Hosp., 547 F. Supp. 484, 494-95 (E.D. Penn. 1982) (following Sibley Mem. Hosp. to find that hospital's denial of staff privileges to a doctor was sufficient to state a claim under Title VII).

In the instant case, there was ample evidence presented at trial to demonstrate that Stouder was an organization which was capable of and in fact and did affect Christopher's ability to engage in her employment as a scrub nurse. As the trial court put it, by discriminating against Plaintiff and refusing to grant her privileges to work in its facility, Defendant realistically prevents Plaintiff from performing the job for which she was hired by the physicians. This clearly interferes with Plaintiff's employment

relationship with the hiring physicians and with her opportunity to perform her work. J. App. at 71 (Order denying motion for new trial). As the goal of Title VII is to preserve employment opportunity, we can see no reasons to conclude that Congress intended Title VII to prohibit discrimination by a non-employer defendant on the basis of race of sex, and to allow the same non-employer defendant to discriminate against a person who engages in protected activity under Title VII. In both instances the acts of the non-employer defendant have the effect of denying the plaintiff employment based upon impermissible grounds under the Act. Thus, we find that the trial court had jurisdiction to hear Christopher's §2000e-3 claim based upon the [12 principles and reasoning articulated in Sibley Mem. Hosp. and its progeny.

Stouder also asserts that the trial court did not have jurisdiction to hear this case because Title VII does not apply to "independent contractors." In this argument, Stouder asserts that Christopher's relation to the hospital is analogous to that of an independent contractor. See Falls v. Sporting News Pub. Co., 834 F.2d 611, 613 (6th Cir. 1987) (while the term "employee" is to be construed broadly in Title VII, it is not meant to reach independent contractors). In the instant case, the trial court specifically found that "Plaintiff would not be a hospital employee nor would she be an independent contractor with respect to the hospital." J. App. at 73. The court's finding is supported by the record. As a private scrub nurse, Christopher would not be paid by the hospital nor would she received benefits or insurance from the

hospital. Her direct employment relationship would be with the doctor who hired her to assist in surgery for each specific operation. While Stouder would provide Christopher with equipment and facilities to perform her work, Stouder would not have any control over her work, except to the extent that it could impose its uniform safety standards as it does on all persons who have staff privileges in the hospital. Finally, at not time would Christopher be required to perform services for the hospital itself. On these facts, no contractual relationship would exist between Stouder and Christopher either as an employee or as an independent



contractor. For these reasons, we find

that Christopher does not fall within the independent contractor exception to Title VII. [13]

In sum, we find that the trial court properly had jurisdiction over Christopher's claims.

III.

Stouder next argues that the trial court did not apply the correct legal standards in concluding that Christopher had made out a case of retaliation under Title VII. Specifically, Stouder contends that the trial court failed to find that Christopher was "otherwise qualified" for the position she was allegedly denied based upon retaliation, and that Christopher failed to show that the Stouder hired a less qualified scrub nurse after her

application was denied.

As the trial court correctly noted, the elements of a prima facie case of retaliation are as follows:

> (1) that plaintiff engaged in an activity protected by Title VII; (2) that the exercise of his [or her] civil rights was known by the defendant; (3) that, thereafter, the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action.

Wrenn v. Gould, 808 F.2d 493, 500 (6th Cir. 1987). Based upon this framework, the trial court found that Christopher had met her prima facie burden. Stouder argues that the trial court erred in applying this framework along, without making the other

findings required for a prima facie case of discrimination under Title VII under McDonnell Douglas v. Green, 411 U.S. 792, 802 (1972). Wrenn made clear that "[p]roof of a retaliation claim under Title VII is governed by McDonnell Douglas[.]" Wrenn, 808 F.2d at 500. Key to a finding of discrimination under the McDonnell Douglas framework is proof that the plaintiff "applied and was qualified for a job for which the employer was seeking applicants," and "that, despite his qualifications, he was rejected". 411 U.S. at 802. Stouder argues that [14 Christopher's retaliation claim is fatally flawed because she failed to meet her burden of demonstrating that she was qualified to receive limited privileges as a private scrub nurse. In addition, Stouder asserts that the trial court, in finding that Christopher had made out her claim of retaliation, never made an

explicit finding that Christopher was qualified for the position.

After weighing the testimony and evidence before it, the trial court concluded that "Mrs. Christopher has persuaded this Court that she would have received limited privileges but for retaliation against her on the basis of her prior claim against Wright State." J. App. at 30-31. Christopher argues that the trial court's finding that she would have received limited privileges but for Stouder's retaliation is an implicit finding that she was qualified to perform the job of a scrub nurse. However, as Stouder points out, the court seemed to have serious doubts about Christopher's qualifications. For example, at the end of its memorandum opinion the court stated

> Ms. Christopher seeks reinstatement of her limited

> privileges and to that she is entitled. Stouder is, however, entitled to ensure that she is technically competent as a scrub nurse, since there were some valid concerns expressed about that at the time she was at the hospital and it has now been two and one-half years since she has acted in that capacity. Accordingly, counsel for the parties are directed to consult with a view to devising a neutral objective measurement of Ms. Christopher's present competence to act as a scrub nurse.

J. App. at 33-24 (emphasis added). In addition, the court prescribed a six-week trial procedure to determine Christopher's qualifications for the scrub nurse position. This procedure required medical

evaluators to observe Christopher and file reports. As to the reports, the court stated that, "[e]ach such report shall include the doctor's opinion as to whether Mrs. Christopher is qualified for employment as a gynecological and obstetrical private [15] duty scrub nurse." Id. at 46.

Christopher argues that the court was primarily concerned with her present qualifications as it had been several years since she acted as a nurse due to this litigation. However, the court specifically noted that there had been some valid concerns about her qualifications at the time she was at the hospital. Id. at 33-34. Further there is little or no evidence in the record that demonstrates Christopher's qualifications to act as a private scrub nurse, and this evidence came from her husband and her husband's partner.

As Stouder correctly points out, "Congress did not intend by Title VII...to guarantee a job to every person regardless of qualifications." Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971). Further, "qualification of the complainant is to pivotal component of the McDonnell Douglas prima facie case." Williams v. Boorstin, 663 F.2d 109, 118 (D.C. Cir. 1980) (emphasis omitted), cert. denied, 451 U.S. 985 (1981). Thus, we hold that is was error for the trial court not to make an explicit finding that Christopher was qualified to act as a scrub nurse before concluding that she was the victim of discrimination. We therefore remand for the district court to determine whether Christopher was qualified to act as a private duty scrub nurse at the time the alleged discrimination took place.

In addition to its assertions

regarding the trial court's failure to find that Christopher was qualified, Stouder asserts that the district court erred in failing to require Christopher to show that other less qualified applicants were granted privileges at Stouder after she was denied such privileges. As Stouder correctly points out, the Supreme Court in McDonnell Douglas suggested that plaintiffs seeking to create an interference of discriminatory failure to hire must show, in addition to membership to a protected class and qualifications, that the defendant continued to accept applicants for the position from equally qualified person. 411 U.S. at 802. However, Stouder's premise that failure to make such a finding is [16] reversible error is based upon a misapprehension of the law.

It is well settled that if a plaintiff presents direct evidence of discrimination,

she need not proceed under the McDonnell Douglas formula. Blalock v. Metal Trades, Inc., 775 F.2d 703, 707 (6th Cir. 1985). As the court explained,

> Direct evidence and the McDonnell Douglas formula are simply different evidentiary paths by which to resolve the ultimate issue of defendant's discriminatory intent. "Where the evidence for a prima facie case consist...of direct testimony that defendants acted with a discriminatory motivation, if the trier of fact believes the prima facie evidence the ultimate issue of discrimination is proved; not inference of discrimination is required."

Id. (citations omitted). In the instant

case, the trial court found that Stouder raised its prior qualifications standards and denied Christopher limited privileges in retaliation for her prior sex discrimination suit. The court based its finding upon Christopher's own testimony of discussions she had had with Dr. Hess and Grubb, and the fact that reference to Christopher's prior suit appeared in Dr. Hess's memo to the Executive Committee. Thus, there was direct evidence upon which the court could find that Stouder acted in a discriminatory manner with regard to Christopher. In other words, there was no need for Christopher to produce evidence of retaliatory motive under the McDonnell Douglas framework because the court did not have to infer from Stouder's actions with other applicants that the hospital discriminated in this case.

Stouder also argues that since

Christopher's privileges were denied, the hospital has not granted privileges to any private scrub nurse who did not have at least one year of experience. Thus, Stouder argues, it has not [17] discriminated against Christopher. Rather, the hospital has simply applied its neutral qualification standards across the board to all applicants. However, even if we accept Stouder's claims that it has consistently applied the one year experience standard to applicants after Christopher, this still does not refute the evidence that the hospital raised its prior standards in Christopher's case in order to deny her privileges for impermissible reasons of retaliation. Therefore we find that the trial court's determination that Stouder acted with a retaliatory motive is not clearly erroneous.

IV.

Stouder's last contention is that the trial court mistakenly found that Stouder's new standards for the hiring of private scrub nurses, written by Ms. Nagle, were retaliatory because Ms. Nagle testified that she did not know that Christopher had filed a prior discrimination action. As Christopher points out, this alleged error is based upon a misapprehension of what the trial court found. In fact, the court did not determine that the writing of the standards was retaliatory, although it hinted that they may have been written to include a one year experience requirement which would exclude Christopher. Rather, the discriminatory act was the application of these new higher standards to Christopher by the Executive Committee and other decisionmakers. It was this application of the standards which

"differed substantially from the bases upon which Stouder had in the past hired scrub nurses into its own employment", which evidenced Stouder's discriminatory purpose. J. App. at 75. Therefore we find that the court's finding that the standards used to deny Christopher's application were employed for a retaliatory purpose was not clearly erroneous.[18]

V.

On cross-appeal, Christopher challenges the trial court's failure to grant her back pay damages on her retaliation claim. As Christopher points out, this court has held that:

> The finding of discrimination by the district court, in addition to the nature of the relief (compensatory as opposed to punitive), and the clear intent of Congress that the grant of

> authority under Title VII should be broadly read and applied mandate an award of back pay unless exceptional circumstances are present.

Head v. Timken Roller Bearing Co., 486 F. 2d 870, 876 (6th Cir. 1973). Moreover, this court has held that mere difficulty in calculating the amount of the pay award does not constitute "exceptional circumstances" such as would justify the denial of back pay. Rasimas v. Mic. Dep't of Mental Health, 714 F. 2d 614, 626 (6th Cir. 1983), cert. denied, 466 U.S. 950 (1984) However, an "[a]ward of back pay is not an automatic or mandatory remedy but is within the discretion of the [Trial] Court." Kennerly v. ARP, Inc., 447 F. Supp. 1090, 1101 (E.D. Tenn. 1987) (citing Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975)). Christopher argues that the trial

court had no recognizable justification for denying back pay.

The trial court addressed the issue of back pay twice in its various post trial orders. In its original memorandum opinion, the court found that Christopher was not entitled to back pay for two alternative reasons. First, the court asserted that it was not entitled to granted compensatory damages under Title VII and that since Stouder was not Christopher's employer and would not have paid her salary, it could not be charged with back pay damages. Second, the court noted that "the proof of loss with respect to that potential employer was quite sketchy." J. App. at 33.

Subsequently, the court amended its prior findings of [19] fact and conclusions of law on the back pay issue. In its amended findings, it first noted that it

was in error as to its inability to grant a back pay award against Stouder. However, the court explained and affirmed its findings as to the inconclusive nature of the proof on back pay. The court stated:

> [T]he testimony was very vague about what the arrangement [between Christopher and her husband and his partner] was going to be. The Court's notes reflect no testimony from Ms. Christopher about a pay arrangement. Dr. Dysert testified that [the partnership was] still trying to save for a laser [for surgery] and probably would have started Ms. Christopher out at $1.00. Dr. Christopher admitted there was no agreement about what to do, but thought her salary probably would

be $12,000 per year when she sent on the doctor's payroll.

* * *

The extreme ambiguity of the intended arrangement as outlined above shows Plaintiff did not prove what she actually would have received. Nor was there any proof of what other private duty nurses are paid so as to permit finding an average. Plaintiff did not even suggest in her Proposed Findings of Fact and Conclusions of Law an amount of lost wages from the intended arrangement. While back pay in a Title VII case need not be proven with the exactitude of lost profits in a breach of contract case, neither can such an award be appropriately founded on mere

speculation.

J. App. at 37-38. Based upon these findings, we find that the court did not abuse its discretion in denying back pay in this case. Therefore, we affirm the denial of back pay.

VI.

For the foregoing reasons, we REMAND for the trial [20] court to make specific findings as to Christopher's qualifications to perform as a private scrub nurse at the time she was denied privileges. We AFFIRM the findings of the trial court in all other respects. [21]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

ANASTASIA S. CHRISTOPHER,

Plaintiff,: Civil

Action No. C-3-87-249

-vs- Magistrate Merz

STOUDER MEMORIAL HOSPITAL,

Defendants.:

ORDER DENYING MOTION FOR NEW TRIAL AND SETTING PROCEDURES CONCERNING SUPERSEDEAS BOND

This case is before the Court on Defendant's Motion for a New Trial. (Doc. 55).

This action was tried to the United States Magistrate in July, 1988, sitting without a jury and with the consent of the parties pursuant to 28 U.S.C. §636(c). On July 5, 1988, the Court entered its Memorandum Opinion and Decision embodying findings of fact and conclusions of law under Fed. R. Civ. P. 52. (Doc. 22). The

Court found, inter alia, that Plaintiff had been denied limited staff privileges as a private duty scrub nurse at Defendant's facility in retaliation for her prior protected activity under Title VII and also found that she was entitled to reinstatement of those limited privileges.

Defendant filed the present motion pursuant to Fed. R. Civ. P. 59 and moved the Court for a new trial on the basis that the Court lacks jurisdiction in this matter. Specifically, Defendant argues that the position to which Plaintiff aspired - - that of a private duty scrub nurse - - is clearly that of an independent contractor and therefore the protections of Title VII are not available.

In her Memorandum in Opposition, Plaintiff argues that Defendant had consistently maintained that Plaintiff was in fact, Defendant's employee (a "pool

nurse") throughout the relevant time period. Plaintiff also argues that a formal employer - employee relationship is not needed for Title VII protections to be available but rather, a Plaintiff is protected against discrimination if the Defendant is one who significantly affects access of any individual to employment opportunities. Finally, Plaintiff argues that even if she was not an employee at the time of the retaliatory acts she was at least a former employee and Title VII protections are available when a claim of retaliation is brought by a former employee.

In reply, Defendant cites to numerous cases when courts have held that Title VII protections were not available because no employee status was established. Defendant essentially repeats its argument that Plaintiff was an independent contractor and

therefore Title VII protections are not available to her.

Title VII makes it an unlawful employment practice for an employer to discriminate against any of its employees or applicants for employment because she has opposed any practice made unlawful by Title VII, or because she has made a Title VII charge. See, 42 U.S.C. §2000e-3.

Title VII defines "employee" in broad language: "the term 'employee' means an individual employed by an employer . . ." 42 U.S.C. §2000e(f). The legislative history supports the view that Congress intended to cover the full range of workers who may be subject to the harms the statute was designed to prevent, unless such workers are excluded by a specific statutory exception. Armbruster v. Quinn, 711 F.2d 1332, 1339 (6th Cir. 1983). The term 'employee' in Title VII "must be read

in light of the mischief to be corrected and the end to be attained." Id. at 1340 (citation omitted). The mischief to be corrected is that discrimination in employment opportunity has been made unlawful by Title VII's violation provisions; the end, to rid from the world of work of the evil of discrimination because of an individual's race, color, religion, sex or national origin. Id. Since the statute has been universally held to be broadly remedial in its purpose, such remedial effect can be given only upon a broad interpretation of the term 'employee'. Id. at 1341. One must examine the economic realities underlying the relationship between the parties in an effort to determine whether an individual is likely to be susceptible to the discriminatory practices which the Act was designed to eliminate. Id. at 1340. In

view of the broad terms of Title VII, reasonably precise exceptions, and legislative history all directed towards a test of coverage to all those who are in a position to suffer the harm the statute is designed to prevent, unless specifically excluded, where there is a doubt or ambiguity, it should be resolved in favor of coverage. Id. at 1341.

Although the Sixth Circuit has rejected a narrow construction of the term 'employee' under Title VII, is has nevertheless adhered to a standard that would exclude from the protection of Title VII a person who cannot be considered an employee but is instead clearly an independent contractor. Falls v. The Sporting News, 834 F. 2d 611 (6th Cir. 1987) (citations omitted).

There is no question that if Plaintiff was Defendant's employee at the time of the

discriminatory acts then Title VII protections are available to Plaintiff. However, for the reasons stated more fully below, this Court does not need to make a determination of whether Plaintiff was Defendant's employee at the time of the unlawful acts.

This Court finds that as a private scrub nurse, Plaintiff would not be an independent contractor with respect to Defendant. In the capacity of private scrub nurse, Plaintiff would perform no services for Defendant nor would she be paid by defendant for any services. Plaintiff would perform services for the physicians by whom she would be employed. Accordingly, the Falls, 'independent contractor exception' is not applicable in this case.

The facts of this case are strikingly similar to those in Sibley Memorial

Hospital v. Wilson, 488 F. 2d 1338 (D.C. Cir. 1973). In Sibley, the plaintiff was a male private duty nurse who worked in a private hospital and who obtained employment with patients by referral through a nurses' registry. When a patient needed a private duty nurse, the hospital's nursing office would communicate the request to the registry. Neither the hospital nor the registry was permitted to discriminate on the basis of sex. The registry would match the patient with an available nurse, and the nurse would report to the patient. If the nurse was unacceptable to the patient for any reason, the patient would still be required to pay the nurse one day's wages. The plaintiff complained that supervisory nurses at the defendant hospital has themselves rejected him and prevented him from reporting to the patient when the patient was a female.

The court on Sibley held that the plaintiff had a Title VII claim, despite the absence of an employment relationship between the nurse and the hospital. The court first noted that in Title VII Congress had intended to "achieve equality of employment opportunities." Sibley, 488 F. 2d at 1340-41. (emphasis in original)(citations omitted).

> Control over access to the job market may reside, depending upon the circumstances of the case, in a labor organization, an employment agency, or an employer as defined in Title VII; and it would appear that Congress had determined to prohibit each of these from asserting any power it may have to foreclose, on invidious grounds, access by any individual to employment

> opportunities otherwise available to him. To permit a covered employer to exploit circumstances peculiarly affording it the capability of discriminatorily interfering with an individual's employment opportunities with another employer, while it could not do so with respect to employment in its own service, would be to condone the continued use of the very criteria for employment that Congress has prohibited.

Id. at 1341.

In Sibley, the private nurse was not the hospital's employee nor was he an independent contractor with respect to the hospital. Although the hospital provided equipment, supplies, a place for him to perform his work and presumably imposed

standards, his employment relationship was with the patients and not with the hospital. However, the hospital was in the position to interfere with his employment relationships and opportunities and the court found that was sufficient for Title VII protections to attach.

In the present case, as a private scrub nurse, Plaintiff would not be a hospital employee nor would she be an independent contractor with respect to the hospital. As in Sibley, although, Defendant would provide Plaintiff with equipment, supplies, instruments, a place for her to perform her work, and impose standards, Plaintiff's employment relationship would be with the physicians for whom she works. However, and again as in Sibley, Defendant was in a position to interfere with Plaintiff's employment relationship and opportunities. By

discriminating against Plaintiff and refusing to grant privileges to work in its facility, Defendant realistically prevents Plaintiff from performing the job for which she was hired by the physicians. This clearly interferes with Plaintiff's employment relationship with the hiring physicians and with her opportunity to perform her work. Therefore, Title VII projections are available to Plaintiff and this Court has jurisdiction of her Title VII claims.

For all of the foregoing reasons, this Court finds that Title VII protections are available to Plaintiff and therefore this Court has jurisdiction over Plaintiff's Title VII claims. Accordingly, Defendant's Motion for a New Trial is not well taken and is overruled.

It is therefore ORDERED that Defendant's Motion for a New Trial is

overruled.

This case is also before the Court upon Defendant's Motion to Stay Execution of Judgment pending decision on the motion for a new trial (Doc. #56) and Defendant's Memorandum Requesting Clarification (Doc. #61).

At the time the motion stay execution was filed, the Court held a conference among counsel on February 20, 1990, who agreed that they would confer and agree on an amount liquidated damages which would be suffered by Plaintiff for each day or other work period she missed pending decision on the motion for new trial and presumable pending appeal. On March 27, 1990, Plaintiff's counsel reported to the Courts clerk that the parties had been unable to agree on an amount of liquidated damages, but continued to agree in principle on that approach.

Defendant has now filed a Memorandum Requested Clarification (Doc. #61) which in its penultimate paragraph asks this Court to amend the judgment and enter judgment for Defendant on the grounds that Plaintiff is not qualified as a private duty scrub nurse.

The memorandum, which is in reality a motion to amend the judgment, is untimely. Under Fed. R. Civ. P. 59(e), such a motion must be filed not later than ten days after the entry of judgment, which occurred February 5, 1990.

Moreover, the reasoning of the Memorandum is flawed. IT repeats the observation that Ms. Christopher does not meet Stouder's present standards for private duty scrub nurse nursing, but the Court previously found that those standards were developed as part of Stouder's discrimination against Stacy Christopher:

they were written in a way which made her ineligible, but differed substantially from the bases upon which stouder had in the past hired scrub nurses in its own employment.

Defendant argues that Ms. Christopher does not meet the standards of other area hospitals, and that is apparently true. However, those hospitals did not develop their standards as part of a discriminatory pattern and they are not defendants in this action.

Defendant also argues that Ms. Christopher has not been in an operating room for over four years. However, it is Stouder Hospital which has adamantly fought Ms. Christopher's return to the operating room since this litigation was filed.

When the Court made its initial decision on liability, it attempted to accomodate Stouder's concerns about Ms.

Christopher's technical competence by getting that competence certified by disinterested outside experts. That process turned out not to be feasible. During that entire process, Stouder has refused to compromise at all.

The Court reiterates its prior Order: Defendant shall grant the Plaintiff limited private duty scrub nurse privileges in accordance with her application of March 26, 1986. Without modifying that judgment, the questions presented by Defendant for interpretation are answered as follows:

1. Stouder may require Plaintiff to fill out an updated application to the extent that such application is for information gather. The application to be granted is that of March 26, 1986.

2. Stouder may verify Mr. Christopher licensure.

3. Stouder may not request up-to-date references.

4. Stouder may inquire about continuing education, but may not refuse privileges on the basis of any answer. Once privileges are granted, Ms. Christopher may be required to fulfill any continuing education requirement imposed by Stouder on private duty scrub nurses equally.

5. Stouder may require proof on insurance to the same extent it does with other private duty scrub nurses.

6. Ms. Christopher is not required to meet current criteria.

Although the Court urges the parties to negotiate an end to this controversy, the Court assumes that Defendant intends to appeal. If a notice of appeal is filed, the Court wishes to indicate its willingness to stay execution pending

appeal upon the posting of a supersedeas bond in an amount double the reasonable expected annual income of Ms. Christopher is she were permitted to work. Since the Court understands the parties have been unable to reach an agreement on what that amount would be, on request of either party the amount supersedeas bond will be set for prompt hearing.

UNITED STATES MAGISTRATE

Filed March 30, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

ANASTASIA S. CHRISTOPHER,

Plaintiff,: Civil Action No. C-3-87-249

-vs- Magistrate Merz

STOUDER MEMORIAL HOSPITAL,

Defendant,:

JOURNAL ENTRY MODIFYING DECISION ON REMEDY

This action was tried to the United States Magistrate in July, 1988, sitting without a jury and with the consent of the parties under 28 U.S.C. §636(c). On July 25, 1988, the Court entered its Memorandum Opinion and Decision embodying findings of fact and conclusions of law under Fed. R. Civ. P. 52.

The Court determined that Plaintiff had been denied limited staff privileges as a private duty scrub nurse at Defendant's facility in retaliation for her prior protected activity under Title VII and

found that she was entitled to reinstatement of her limited privileges. It directed the parties to negotiate a neutral objective measurement of her technical competence as a scrub nurse (Doc. #22).

The parties were unable to agree and the Court held a hearing remedy on October 31, 1988. On March 6, 1989, the Court adopted Plaintiff's proposal that she work under the supervision of a neutral obstetrician/Gynecologist for six weeks and obtain his or her report on her competence (Doc. #47).

Plaintiff now reports to the (Doc. #50) that despite diligent effort she has been unable to carry out this plan. From her report, she is in a "Catch 22" situation: she cannot obtain limited privileges at Good Samaritan Hospital so as to work with the doctors the Court has

approved, probably because of her prior legal difficulties, although this has not yet been proven.

What has been proven to the Court's satisfaction is that its earlier decision on remedy is flawed. The Court has determined that Plaintiff was unlawfully deprived of limited privileges at Stouder and is entitled to their restoration (Doc. #22). Plaintiff's good faith efforts and Defendant's prior inability to suggest a workable alternative convince the Court that it must now order restoration of the privileges without further processing of the Plaintiff.

It is accordingly ordered that Defendant grant Plaintiff limited staff privileges as a private duty scrub nurse in accordance with her application on March 25, 1986. Such privileges shall permit her to work as a private duty scrub nurse only

for those doctors who desire her services in that capacity and who themselves compensate her directed for her services and maintain adequate malpractice insurance covering her work. In other words, it is not the Court's intention to compel Stouder to enter into an employment relationship with Ms. Christopher. It is the Court's understanding from the hearing on remedy that this is exactly the way in which other private duty scrub nurses are treated at Stouder.

UNITED STATES MAGISTRATE

Filed February 5, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

ANASTASIA S. CHRISTOPHER,

Plaintiff, : Civil Action No. C-3-87-249

-vs-

Magistrate Merz

STOUDER MEMORIAL HOSPITAL,

Defendant. :

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MEMORANDUM OPINION AND DECISION

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This is an action for employment discrimination under Title VII of the Civil Rights Act of 1964 with a pendent state breach of contract claim. After completion of discovery, the parties consented to magistrate trial jurisdiction under 28 U.S.C. §636(c) and the case was tried to the bench on July 11, 12, and 13, 1988. The following opinion embodies the Court's findings of fact and conclusions of law required by Fed. R. Civ. P. 52.

Plaintiff Anastasia Christopher is a female citizen of the United States. She was awarded a bachelor of science degree in nursing by Ohio State University in 1974 and a master of science in nursing degree by the same institution in 1977, with particular training in maternal and child health. She is married to Charles Christopher, M.D., a practicing obstetrician and gynecologist.

From 1978 until 1983 or 1984, Ms. Christopher was a faculty member at the Wright State University School of Nursing. On or about June 16, 1983, she filed a sex discrimination claim against Wright State arising out of circumstances not explained during the trial of this case. That charge eventually grew into a Title VII lawsuit in this Court, Civil Action No. C-3-84-391, which was resolved prior to trial on a basis not revealed during testimony in this case.

During the same time period, Dr. Christopher was experiencing what he described as "political" problems with Miami Valley Hospital where he was head of obstetrics. He left Miami Valley and sued it, against on a basis and with results not revealed here. However, he and Ms. Christopher decided to move to Troy, Ohio, where he went into partnership with Dr. Gerald Dysert.

Defendant Stouder Memorial Hospital is a corporation organized under the laws of the State of Ohio and an "employer" within the meaning of 42 U.S.C. §2000-e(b).

Dr. Dysert was already performing deliveries and gynecological surgery at Stouder when Dr. Christopher joined him. Both doctors concluded that modifications of obstetrical practice were needed at Stouder, including modification of the labor room to permit doing emergency

cesarean section deliveries there rather than transferring patients to the operating room with attendant delays.

During the Spring of 1985, Ms. Christopher was hospitalized for surgery at Stouder. During her recovery she discussed the possibility of her employment at Stouder with Ms. Sally Swisshelm, Director of Nursing. She was anxious to get back into nursing and had already had some discussions with her husband and his partner about being their private duty "scrub" nurse for their surgery.

After some additional discussions with Ms. Swisshelm, Ms. Christopher was employed at Stouder on June 10, 1985. Ms. Christopher testified she was hired as a "clinical nurse specialist" which is a job classification for which her training qualified her. However, no such position existed at Stouder and Ms. Swisshelm did

not have budget authority to hire someone full-time to perform such functions. Instead, Ms. Christopher was hired as a "pool" nurse in obstetrics, which meant that she was available to be called in as needed to assist in labor, delivery, and the nursery. In addition, Ms. Swisshelm wanted her to evaluate the performance of the obstetrical nurses. Eventually she would work into more formal training of those nurses, helping them to upgrade their skills.

Ms. Christopher's pay as a pool nurse was to be $8.75 per hour. She recalls discussing an annual salary, to be negotiated later. of between $18,000 and $20,000 based on the market for persons with her qualifications. No agreement on such a salary was ever reached and she was paid at $8.75 per hour throughout her employment at Stouder.

Whatever Ms. Christopher's qualifications by education, it was or should have been clear to all parties that her employment to train the obstetrical nurses would create tensions. She was a newcomer, whereas most of the nurses in the department had been there for some time, the head nurse, Pat Druley, for approximately twenty years. Most importantly, she was the spouse of a doctor who, with his partner, did most of the deliveries in the hospital. These facts were bound to create tension over role and status.

Pursuing the other part of her plan, Ms. Christopher applied in July, 1985, for limited privileges to act as a private duty scrub nurse. The procedure for deciding on such privileges was that the application would remain with the medical staff secretary until complete and then be passed

upon by the Executive Committee of the Medical Staff, the full Medical Staff, and the Board of Trustees of the hospital in turn. Prior to the permanent grant of privileges, the hospital's chief executive was empowered to grant temporary privileges for a period of ninety days. The Executive Committee approved this request on August 6, 1985 (Pl. Ex. 3) and John Grubb, President of Stouder, granted the temporary privileges on October 23, 1985 (Pl. Ex. 4).

Ms. Christopher began her evaluation promptly and in early July, within a month of her hiring, presented a "Systems Analysis of Obstetrical Nursing" (Jt. Ex. III) to Ms. Swisshelm; the latter was surprised by the formality of the document, having expected more informal feedback. Illustrative of the tensions which were already building, the "Systems Analysis" is 50% devoted to a very strong critique of

Mrs. Druley, the head obstetric nurse. Ms. Christopher's analysis focuses on both Mrs. Druley's management style and on Ms. Christopher's opinion of the psychological reasons for the problems. At the same time Ms. Christopher prepared Jt. Ex. 4 on problems in the nursery. Jt. Ex. V reflects the tensions in obstetrics as of September 25, 1985. On October 9 and 10, some of Ms. Christopher's job functions were formalized by memorandum, apparently again in an attempt to gain acceptance for her role (Jt. Exs. VI, VII).

One of Ms. Christopher's tasks was to prepare the obstetrical nurses to assist as scrub nurses when cesarean sections began to be done in Labor and Delivery. Apparently everyone agreed she needed training in that area herself, since she had had very little prior experience; and she began to train in the Stouder operating

room in July and August, 1985. The plan was that she would pass the training on to the nurses in Obstetrics, rather than have them sent to Miami Valley Hospital in Dayton for scrub training, as Mrs. Swisshelm had earlier planned. There was obviously some confusion about why she was scrubbing in the Operating Room; Mrs. Maxine Nagle, the operating room supervisor, was under the impression that she was a trained scrub nurse.

After her temporary privileges were granted on October 23, 1985, Ms. Christopher began to act as private duty scrub nurse for her husband and his partner. A scrub nurse's duties are principally to prepare instruments for surgery and to hand them to the surgeon during the operation, cleaning up afterwards. As of 1985 there were only two nurses acting in this capacity; according

to Mrs. Nagle there had only been one prior experience with a private duty scrub nurse in her thirty years in surgery. The usual practice would be to have this function fulfilled by a nurse employed by the hospital and assigned the task.

Private duty scrub nurses are paid by the doctors for whom they work. Ms. Christopher, however, was not paid by Drs. Dysert and Christopher. Instead, when she was acting as their scrub nurse, she closed in on the hospital time clock (See Def. Ex. M) and was paid by Stouder. This was because Drs. Dysert and Christopher wanted to save money for a laser for gynecological surgery and therefore wanted Ms. Christopher carried on the hospital's malpractice insurance, instead of paying for it themselves.

By January, 1986, Mrs. Swisshelm had concluded that the obstetrical nurses were

not acquiring the required new skills fast enough. She decided to hire an obstetrics supervisor who would perform the training tasks assigned to Ms. Christopher and the supervisory tasks assigned to Mrs. Druley. Mr. Grubb approved this decision and on January 10, 1986, Mrs. Swisshelm advised Ms. Christopher that her services as a clinical nurse specialist would no longer be needed.

Drs. Christopher and Dysert learned what had happened, they confronted Mr. Grubb and Mrs. Swisshelm and then went to the obstetrics unit and wrote on all their patient charts that Mrs. Druley was not to attend their patients, an act both of them admit was unprofessional.

Ms. Christopher was unwilling to accept Mrs. Swisshelm's decision and retained counsel who wrote to the hospital's counsel on January 28, 1986. In

the meantime, her temporary limited privileges had expired by reaching the ninety-day limitation on January 10 and he finally responded on January 28, 1986 (Def. Ex. E, pp. 12, 18-19).

Before the question of privileges was presented to the Executive Committee, Mrs. Swisshelm's comments were obtained. In a memorandum dated january 31, 1986, she not only questioned Ms. Christopher's training abilities, but also characterized her as "disruptive" and "untrustworthy." (Def. Ex. E, p.21). She noted that Ms. Christopher had written on doctor's progress notes in contravention of hospital policy and after being advised it was inappropriate. She asserted Ms. Christopher's presence had caused "chaos" in both Obstetrics and Surgery.

Dr. Mark Hess, a member of the Executive Committee, also prepared a

memorandum on Ms. Christopher's privileges application. At the request of the Chief of Medical Staff, Dr. Ellenbogen, he had contacted L.R. Jordan, chief executive of Miami Valley Hospital, about Ms. Christopher's work when she was stationed there by Wright State University. According to Dr. Hess's memorandum of the call (pl. Ex. 10), Mr. Jordan informed him that Ms. Christopher's tenure at Miami Valley had been "marked by severe turmoil," that she had "assumed authority far beyond what was proper" including writing prescriptions for her husband's countersignature, and that she had an "endless series of conflicts with many people." He also advised that Miami Valley had insisted on her transfer and she had thereupon sued Wright State for sex discrimination.

On February 4, 1986, the Executive

Committee, having received both the Hess and Swisshelm memoranda, voted unanimously to deny Ms. Christopher's application for limited privileges.

Dr. Hess was the only member of the Executive Committee to testify. He denied that he had considered the prior Title VII lawsuit in deciding how to vote. Ms. Christopher offered corroboration of her belief that the prior lawsuit had been considered by others. She recalled a telephone conversation with Mr. Grubb sometime after January, 1986, in which she tried to negotiate at least her privileges and in which Grubb said "If you hadn't had some legal action prior to this, this might not have occurred." Mr. Grubb might have been referring to her having brought counsel into the termination situation, but, although present, he did not take the stand to deny or explain this remark.

Ms. Christopher also recalled a conversation with Dr. Hess on March 8, 1986. She had been told by Dr. Dysert (not a member of the Executive Committee) that the denial was caused by her very broad request for privileges (Jt. Ex. IX) which included many procedures only performed by doctors at Stouder. Dr. Hess asked her if she planned to re-submit a narrow scope application. During the conversation she claims Dr. Hess told her wouldn't have been in her dilemma if she hadn't brought a lawyer into the matter and had not filed the prior lawsuit. Dr. Hess cannot recall this part of the conversation and disputes that it occurred based on his memorandum of the call the next day (Def. Ex. E, p.22) which makes no mention of this portion of the conversation.

On March 20, Ms. Christopher withdrew her prior application (Def. Ex. E., P.24)

and on March 25 she submitted a new, narrow application for limited privileges (Id., p. 25 et seq.). Her husband, Dr. Dysert, and Kevin Horvath, a pediatrician practicing at Stouder, submitted supporting recommendations.

At some point in time Mrs. Nagle, after consulting with Dr. Ellenbogen, the Chief of Medical Staff, prepared a set of Standards for Private Scrub Nurse (Def. Ex. F). This document, which purports to have been prepared in February, 1986, was not approved by the Executive Committee until 1987, yet it was used by Mrs. Nagle to prepare a survey questionnaire for the other surgery nurses to rate Ms. Christopher and the other person then working as a private scrub nurse. Def. Ex. I, a more complete copy of which is part of Def. Ex. E, purports to represent the results of that survey and shows that

virtually all the other operating room nurses felt Ms. Christopher was deficient with respect to the standards. The results of the survey were made available to the Executive Committee which on May 6, 1986, again voted to deny Ms. Christopher privileges.

This time the recommendation was taken to the full Medical Staff on May 19, 1986. Dr. Christopher was able to ask for reasons for the denial. Dr. Horvath recalled that someone answered that Ms. Christopher had been a troublemaker at Miami Valley as well as at Stouder. Privileges were denied on a 9-7 vote which was ratified by the Stouder Board of Trustees on May 27, 1986. No witness could recall any occasion when either the full Medical Staff or the Trustees had overruled an Executive Committee recommendation on privileges.

Ms. Christopher claims that her employment

as a clinical nurse specialist was terminated and she was denied limited privileges in breach of her contract rights as a Stouder employee. She also claims both these acts were unlawful retaliation for her prior Title VII claim against Wright State. At the conclusion of Plaintiff's case, the Court dismissed under Fed. R. Civ. P. 41(b) the claim that the termination of employment was in retaliation. The evidence established that the decision to terminate Ms. Christopher's services was made by Mrs. Swisshelm alone. There is no evidence Mrs. Swisshelm even knew about the prior matter, although Ms. Christopher had put on her job application that she left Wright State because of "job discrimination." Mrs. Swisshelm testified convincingly about the interpersonal problems and the lack of progress in training the obstetrical nurses. The Court

is not persuaded that she was motivated by any discriminatory animus. As to any breach of contract by denial of limited privileges, the Defendant argued this claim had not been pled and Plaintiff responded by asking leave to amend to conform to the evidence under Fed. R. Civ. P. 15(b). Plaintiff's motion to amend is granted, but the claim is without merit. It rests on Plaintiff's argument that Article IX of the Stouder Medical Staff Bylaws, Rules and Regulations (Def. Ex. A) entitle her to certain due process rights upon the denial of her limited privileges which she was not given. There is no dispute that she was not afforded the notice and hearing rights in question. However, these rights by their own terms do not apply to a nurse. Article IX throughout refers to rights of a "practitioner" and that term is defined to include only licensed physicians. While the

Bylaws are the document which regulates the grant of limited privileges, they do not extend the internal "due process" protections to non-physicians. Ms. Christopher's breach of contract claim relating to her termination as a clinical nurse specialist relies on her theory that the Stouder Employee Personnel Handbook (Def. Ex. C) constituted a contract between her and the hospital which was breached when the hospital discharged her without following the disciplinary procedure set forth in the handbook. In determining a pendent breach of contract claim, this Court is bound to apply Ohio law. Erie Railroad Co. v. Tompkins, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1938). Plaintiff relies on Day v. Good Samaritan Hospital, App. No. 8062 (Montgomery County, 8/11/83) for the proposition that an employee personnel handbook can become a

part of the contract of employment of an at-will employee and result in contractual rights respecting termination. The same principle has been recognized in Mers v. Dispatch Printing Co., 19 Ohio St. 3d 100 (1985) and Helle v. Landmark. Inc., 15 Ohio App. 3d 1 (Lucas County 1984). Plaintiff complains that she was not given the prior warnings set forth in the Discipline section of the handbook (p. 20) and in particular that her dismissal was not approved by the Director of Personnel. Defendant presented no contrary evidence on these claims. The Court, however, is unpersuaded by Ms. Christopher's contract claim. First of all, Ms. Christopher did not testify convincingly that she ever relied on the handbook. More importantly, she was not discharged for any sort of disciplinary reason. Mrs. Swisshelm decided that the obstetrical nurses were not

acquiring the required new skills fast enough and it was obvious that Mrs. Druley and Ms. Christopher were not cooperating, despite many attempts, in training them. She decided to perform the training function in another way, by hiring an obstetrical supervisor. That meant she no longer could use Ms. Christopher who was in effect laid off. It also meant a drastic job change for Mrs. Druley. The language of the discipline section deals with employee malfeasance (e.g. theft, falsification of time cards, etc.), not with terminations for lack of work. Ms. Christopher's final claim -- that she was denied scrub nurse privileges in retaliation for her prior Title VII claim against Wright State -- requires more extended analysis. The elements of a prima facie retaliation claim are:

(1) that plaintiff engaged in an activity

protected by Title VII; (2) that the exercise of his [or her] civil rights was known by the defendant; (3) that, thereafter, the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action. Wrenn v. Gould, 808 F. 2d 493, 500 (6th Cir. 1987) following Cohen v. Fred Meyer, Inc., 686 F. 2d 793, 796 (9th Cir. 1982). The facts set forth above demonstrate Ms. Christopher had established a prima facie case; as to the fourth element, the causal connection, there are numerous circumstances and indirect admissions by the decision makers involved from which a causal connection could be inferred. Once a prima facie case has been established, a defendant is required to articulate a legitimate nondiscriminatory

reason for its decision. McDonnell Douglas Corp. v. Green, 411 U.S.792, 36 L.Ed. 2d 668,93 S. Ct.1817 (1973). Stouder Hospital has met this burden in a number of ways. First, it produced Mrs. Swisshelm's January 31, 1986, memorandum regarding her difficulties with Ms. Christopher; some were relevant to the termination as clinical nurse specialist, but some, such as disregard of authority and policy, were relevant to the scrub nurse privileges. Second, it produced Mrs. Nagle's survey of the operating room nurses who indicated deficiencies in Ms. Christopher's performance there. Third, it produced that portion of Dr. Hess's February 3, 1986, memorandum which recites the problems with Ms. Christopher's performance at Miami Valley. The Court emphasizes here, as it did orally during trial, that a Title VII claimant cannot

insulate poor job performance in a prior job from consideration by a later employer simply by making a Title VII claim against the prior employer. In referring to what he knew of her prior performance, Dr. Hess was calling the Executive Committee's attention to highly relevant information; when that information was presented at trial, Stouder articulated a legitimate nondiscriminatory reason for its action. Once a legitimate nondiscriminatory reason has been articulated, the presumption of discrimination which flows from proof of a prima facie case is eliminated. Weems v. Ball Metal & Chemical Division, Inc., 753 F. 2d 527, 529 n.2 (6th Cir. 1985). Since Stouder articulated at least three legitimate nondiscriminatory reasons for denying privileges, Ms. Christopher was then obliged to demonstrate that these reasons were pretextual. Texas Department

of Community Affairs v. Burdine, 450 U.S. 248, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981). Proving pretext is equivalent to proving that the real reason, the "but for" cause, for the adverse employment action is discriminatory animus. Goostree v. Tennessee, 796 F. 2d 854, 863 (6th Cir. 1986). In Blalock v. Metals Trades, Inc., 775 F. 2d 703 (6th Cir. 1985), the court established guidelines for deciding dual motive Title VII cases where an employer was motivated by both a discriminatory and a nondiscriminatory animus. Essentially the Sixth Circuit applied the "same decision" test of Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 97 s. Ct. 568, 50 L. Ed. 2d 471 (1977): once plaintiff has proved discrimination was more likely than not the cause of the employer's decision, the burden shifts to the employer to prove by

a preponderance of the evidence that the adverse decision would have occurred anyway. Haskins v. United States Dept. of Army, 808 F. 2d 1192, 1197 (6th Cir. 1987); East Texas Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395, 404 n. 9, 97 S. Ct. 1891, 1897 n. 9, 52 L. Ed. 2d 453 (1977). Ms. Christopher has persuaded this Court that she would have received limited privileges but for retaliation against her on the basis of the prior claim against Wright State. Although there were other factors which they could have relied on, the prior litigation and trouble at Miami Valley kept being mentioned by the decision makers (Mr. Grubb, Dr. Hess, Dr. Ellenbogen) both to Ms. Christopher and to others (Dr. Dysert, Dr. Horvath) between the time of the first Executive Committee decision (2/4/86) and the Medical Staff decision (5/19/86).

In addition, much of the evidence on which the second denial in May was based seems to have been manufactured to guarantee the result. Mrs. Nagle drafted private scrub standards (Def. Ex. F) which by their very terms made Ms. Christopher ineligible. They required one year's full time hospital scrub nurse experience at sometime in the past and employment in that capacity within two years prior to coming to Stouder. These standards are plainly discriminatory against the private scrub nurse concept since Mrs. Nagle admitted on the stand that nurses were sometimes hired directly from nursing school into the operating room at Stouder. Further, the standards excluded Ms. Christopher, a fact which Mrs. Nagle could easily have learned from examining her privileges file (Def. Ex. E). The question then becomes whether Stouder has

persuaded the Court it would have made the same decision in the absence of discriminatory motive. It has not. The only decision maker to take the stand, Dr. Hess, denied any retaliatory motive, but mentioned the prior litigation to a number of people in the February-May, 1986, time period. None of the other decision makers testified as to their reasons. The competence reasons which they might have relied on are not strong. Mrs. Nagle's observations about Ms. Christopher's scrub technique were made upon the erroneous assumption that Ms. Christopher was a trained and experienced scrub nurse. The anonymous survey of other surgical nurses was flawed in technique and essentially gave Ms. Christopher's competitors a veto over her working. In any event, there is no proof the Executive Committee inquired in any depth into competence questions;

the relevant meeting minutes are completely opaque on any discussion. Other reasons which might have been relied upon are stronger. Ms. Christopher refers to herself as a "change agent," a person whose presence and role create turmoil. There is ample evidence this occurred at Stouder, but there is not sufficient proof to persuade this Court Ms. Christopher would have been denied privileges on that basis, absent the prior lawsuit.

Defendant argued in closing that the Court lacks subject matter jurisdiction because Ms. Christopher filed her charge with the Ohio Civil Rights Commission on May 23, 1986, and the Board of Trustees did not finally confirm the denial until May 27, 1986. No authority is offered for the argument and it was not included in Defendant's prior jurisdictional motion (Doc. #2) which District Judge Rice

overruled. Plaintiff had already suffered a discriminatory denial of privileges in February and no witness could recall any occasion when the Board of Trustees had overruled a Medical Staff decision on privileges. The timing of the charge in this case creates no prejudice to the Defendant, which could have remedied the claim on May 27th but did not. The Court finds no jurisdictional defect. As to the relief to be awarded, Ms. Christopher is not entitled to back pay. Had she been given the limited privileges she sought, the testimony is that she would have been placed on the payroll of her husband's and Dr. Dysert's private practice. No one contemplated that she would continue to act as a private scrub nurse but be on Stouder's payroll; in fact, Mrs. Swisshelm regarded the fact that that had happened at all as quite irregular. While the

denial of privileges may have caused her to lose the opportunity to work as a private scrub nurse, the Court is not entitled to award general compensatory damages under Title VII, but only back pay. In any event, the proof of loss with respect to that potential employment was quite sketchy. Ms. Christopher seeks reinstatement of her limited entitled to ensure that she is technically competent as a scrub nurse, since there were some valid concerns expressed about that at the time she was at the hospital and it has now been two and one-half years since she has acted in that capacity. Accordingly, counsel for the parties are directed to consult with a view to devising a neutral objective measurement of Ms. Christopher's present competence to act as scrub nurse. If the parties are unable to agree on a process of measurement within thirty days,

they shall present competing proposals to the Court which will adopt one. Ms. Christopher has sought attorney fees and appears to be a prevailing party within the requirements for such an award. Plaintiff may present an appropriate fee petition.

July 23, 1988.

Michael R. Merz
UNITED STATES MAGISTRATE

MR. DIXON: Mrs. Swisshelm, I would like to refer you now to Exhibit E. May I help the witness find this --

THE COURT: I think you can do that and we'll do it while we're having a brief recess. Five minutes.

(Recess.)

THE COURT: You may proceed, sir.

MR. DIXON: Thank you.

BY MR. DIXON:

Q. Mrs. Swisshelm, I'd like to refer you to a memo dated January 31 that's contained in Exhibit E of defendant's exhibits. Can you identify that document?

A. Yes, sir.

Q. And what is it?

A. It is Mr. Grubb had requested that I write my nursing feelings on Mrs. Christopher and this is the document that I wrote.

Q. You did write this?

A. Yes, sir.

Q. And you gave it to Mr. Grubb?

A. Yes, sir.

Q. What was your understanding of Mrs. Christopher's employment status on January 10, 1986?

A. She was a pool nurse.

Q. Had you ever taken her out of the pool?

A. No.

Q. Could you go back to now the status card that we talked about before that's on Exhibit B. Do you have that?

A. Yes, sir.

Q. Your name's on that card; correct?

A. Yes.

Q. And the date. The date effective, do you see that?

A. Yes.

Q. Did you provide any information to the personnel department after June 10

regarding Mrs. Christopher's status?

A. No.

Q. After Mrs. Christopher left her teaching responsibilities on January 10, did you have a discussion with anybody concerning Mrs. Christopher's possible use in the pool?

A. Yes.

Q. And when was that?

A. Well, it was after this. Dr. Dysert called